Title : An analysis of the mandatory admission criterion within youth justice diversionary processes

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AN ANALYSIS OF THE MANDATORY ADMISSION CRITERION WITHIN YOUTH JUSTICE DIVERSIONARY PROCESSES

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A thesis submitted to the University of Bedfordshire, in partial fulfilment of the requirements for the degree of Professional Doctorate in Youth Justice.

August 2016

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ABSTRACT

> *'to require old heads upon young shoulders is inconsistent with the law's compassion to human infirmity' (Lord Diplock in Director of Public Prosecutions v Camplin Appellant [1978] AC 717)'*

For young people in England and Wales who offend, diversion from formal proceedings has historically been a principle constituent of youth justice policy and practice, and presently accounts for over a third of all outcomes for detected youth offending (Youth Justice Board for England and Wales, 2015).

Although attitudes concerning diversion have often oscillated between favour and criticism, and there has rarely been a period of sustained consensus or constancy of processes (Bernard, 1992; Goldson, 2010), eligibility for an out of court disposal has traditionally been dependent on an admission of some form being made by a young person.

This thesis seeks to place the evolution of diversionary measures for young people who commit low level offences or engage in nuisance behaviours into a contextual and historical context, and explore why an admission has

become, in the absence of any discernible political, academic or professional considerations, a central tenet of diversionary policies in England and Wales.

Potential barriers which may prevent some young people making an admission and unnecessarily losing eligibility for an out of court disposal are considered, as well as the nature and standard of admission expected from young people, and the circumstances in which admissions are usually sought from them. This thesis also explores whether the mandatory admission criterion is compatible with other statutory and international obligations to consider the welfare of a young person when determining a suitable disposal, and whether it sufficiently distinguishes between young people *unwilling* to make an admission and those who may feel *unable* to.

The thesis seeks to identify the gaps in current academic and professional knowledge concerning whether some young people may unnecessarily forfeit eligibility for a diversionary outcome for the sole reason that they do not make an admission. The research undertaken with relevant professionals' endeavours to fill these gaps by exploring the practical application of the admission criterion, as well considering any suitable alternatives within the existing statutory regime.

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ACKNOWLEDGEMENTS

To my supervisor Dr Tim Bateman for his knowledge, patience and humour. I am not sure he ever expected to supervise a prosecutor - but he has done so with generosity and kindness.

To my partner Dr Peter Harrison and our children Hamish and William for their encouragement.

To my colleague Susan Clegg for her enthusiasm and wise counsel.

To all of the research participants for the generosity of their time.

GLOSSARY OF TERMS

ABC	Acceptable Behaviour Contract
ACPO	Association of Chief Police Officers
ASBO	Anti-Social Behaviour Order
BME	Black and Minority Ethnic
BAEME	Black and Asian Minority Ethnic
CDA	Crime and Disorder Act 1998
CPS	Crown Prosecution Service
CR	Community Resolution
DBO	Drinking Banning Order
EHRC	Equality and Human Rights Commission
FGC	Family Group Conference
FPN	Fixed Penalty Notice
LBJ	Local Justice Board
Nacro	National Association for the Care and Resettlement of Offenders
NFA	No Further Action
OBTJ	Offences Brought to Justice
PACE	Police and Criminal Evidence Act 1984
PND	Penalty Notice for Disorder
YCC	Youth Conditional Caution
YJB	Youth Justice Board
YRD	Youth Restorative Disposal

CHAPTER ONE: INTRODUCTION

> '*It is not unusual for young people to get in trouble with the police. The majority of those that do will only have informal or transient contact, but a significant minority will go on to acquire a criminal record at some point in their adolescence'* (Newburn, 2003:187)

1.1 Why this area of study?

Many young people transgress the law, and in recognition of this diversionary processes are a central tenet of youth justice practice and procedures (Ministry of Justice and Youth Justice Board, 2015; Bateman, 2015). This thesis is an exploration of the mandatory admission criterion as a pre-requisite for diversion from formal prosecution in the Youth Court in England and Wales.

A failure to make an admission can be an immediate barrier to eligibility for an out of court disposal. This is especially salient for very young people who have committed a low level offence who do not make an admission when there is no discernible advantage in prosecuting them, and their welfare is best served by keeping them out of the Youth Court and minimising formal system contact. There has however been a remarkable absence of interest concerning how an admission came to be a key principle of diversionary policy, whether it is a necessary pre-requisite and the standard of admission required is reasonable, and whether it disproportionately impedes diversionary processes.

As a consequence of previous experience as a police station Duty Solicitor, and current employment as a specialist Senior Crown Prosecutor involved in charging decisions and prosecutions of young people aged between 10 and 17 years in the Youth Court, this author identified that young people were routinely appearing at the Youth Court who had not made an admission or satisfactory admission, and but for that sole reason would have been offered some type of formal recordable out of court disposal.

This cohort fell outside of those young people who had not made an admission as they wished to deny any alleged wrongdoing and maintain their innocence throughout all processes, or alternatively they knew they were guilty of an offence but exercised their right to silence with the intention of putting the prosecution to proof. These were instead young people who had no or few antecedents and had committed a low level offence, and were charged and put before the Youth Court for the sole reason that they had not made an admission. Post-charge these young people often came to regret their failure to make an admission and routinely sought another opportunity to do so in order to gain eligibility for an out of court disposal.

The likely success of requests for another police interview to make an admission and secure a diversionary outcome was dependent on highly discretionary and unregulated decision making processes, and were often unsuccessful, resulting in many young people accruing a formal criminal conviction. Despite this, there was a paucity of academic, professional or judicial interest in this area, and an identifiable knowledge gap.

These anecdotal views were subsequently corroborated by primary research undertaken with other relevant professionals (Chapters 3.3 -3.7 and Chapters 7.0 -7.18).

Chapters 7.1 and 7.2 further examines what existing knowledge there is concerning the admission criterion and why this area has been neglected by academics and professionals.

Although this thesis seeks to explore features of diversionary processes which prevent young people making an admission and gaining eligibility for an out of court disposal, it recognises that an admission should only be made by a young person if there is, or is likely to be, sufficient evidence for a realistic prospect of conviction. In the absence of such evidence it is reasonable and proper to either deny any wrongdoing or to exercise a right to silence, and this course of action can sometimes result in the best outcome for a young person.

This thesis distinguishes however between those young people who knowingly or wilfully do not make an admission in the knowledge that it shall preclude a diversionary outcome - such as those who intend to deny an offence, raise a defence or put the prosecution to proof by exercising their right to silence - and those young people who do not make an admission or fail to make a satisfactory admission when there is no discernible advantage to them, and no apparent reason why they took this course of action, and which is subsequently regretted.

The original analysis of existing literature and other secondary data (Chapters Four and Five) seeks to place the development of the admission criterion within an historical context, explore why it has become a central tenet within diversionary practices, examine whether the existing criterion is necessary, whether it is too onerous, whether the circumstances in which an admission is usually sought are reasonable, and whether any alternative regimes or amendments to existing practices may reduce the likelihood of a failure to make an admission.

The primary research undertaken with relevant professionals directly involved in processes where admissions are sought from young people who offend – police officers, police civilian interviewers and legal representatives (defence solicitors and accredited police station representatives) – sought to answer the same research questions (Chapters 3.4 – 3.6 and Chapter Seven)

1.2 Chapter Summary

Chapter Two considers the nebulous concept of what diversion means in the wider field of youth justice, and how the formalisation and expansion of diversionary practices has primarily displaced the use of non-recordable informal measures. Although the admission criterion has become a central tenet of statutory diversionary regimes, and this thesis seeks to identify improvements in the existing diversionary regime so that a greater number of eligible young people do not unnecessarily lose this disposal, this chapter

recognises that some diversionary measures often still results in other formal system contact.

Chapter Three sets out the key research questions and research design, which involved a multi-method approach, and included original analysis and review of secondary ‘white’ and ‘grey’ material, analysis of case law, and research with stakeholders engaged at the forefront of diversionary practices, namely police officers, civilian interviewers (civilian police employees who are increasingly tasked with interviewing suspects in custody) and defence legal representatives.

The research was intended to answer three key questions:

I. Is the admission criterion an unnecessary barrier for young people who have committed a low level offence gaining eligibility for a diversionary disposal?
II. If so, why are some young people not admitting an offence when it is often in their best interests to do so?
III. Are there alternative criterion or amendments to existing practices which may better facilitate young people gaining access to diversionary outcomes?

Chapter Four examines and contextualises the historical, political and social variances concerning diversionary disposals for young people who offend, and how the practice of an informal police admonishment, which was initially wholly reliant on the unfettered discretion of a police constable, developed throughout the twentieth and early twenty-first century into a rigidly

prescriptive statutory practice, where a young person is ordinarily expected to make a clear and reliable admission to all elements of the offence, often during one police interview and whilst detained in custody.

The admission criterion is further considered within the context of diversionary measures which have operated since the late nineteenth century, and have ranged from an admonishment, informal police caution, formal police caution, caution plus, reprimand, Final Warning, Penalty Notice for Disorder (PND), Fixed Penalty Notice (FPN), Acceptable Behaviour Contract (ABC), Drinking Banning Order (DBO), Youth Restorative Disposal (YRD), Youth Caution, Youth Conditional Caution (YCC) and Community Resolution, as well as a myriad of alternative diversionary disposals operating within separate regional schemes.

Within this chapter this thesis explores the historical tensions between the police and magistracy to retain authority for determining outcomes for young people who offend, the extraordinary variances in regional diversionary practices, and initiatives which ostensibly sought to de-criminalise or support young people but which in fact widened the net of young people drawn into the criminal justice system. This thesis seeks to highlight the absence of any consideration of the necessity for the admission criterion throughout these cycles of diversionary policies, despite it usually being a key element of these procedures.

Chapter Four also seeks to contextualise how attitudes and policies concerning the diversion of young people who offend have oscillated at

times between radical benevolence and rigid punitiveness, and how these influences may have affected the nature and standard of admission required. Contemporary diversionary processes are further also examined within this context.

Chapter Five considers the development of international and domestic human rights within domestic youth justice practices, and whether the mandatory admission criterion is compatible with other welfare centred statutory considerations concerning young people who offend.

Chapter Six seeks to identify when, why, and how an admission became a key pillar of diversionary policy in England and Wales. It also explores what the current criterion is, what opportunities there are to make an admission, and in what circumstances. The processes of arrest, detention in custody, a formal police interview, pre-interview disclosure, likely knowledge of diversionary processes, and the role of key participants such as police and civilian interviewers, Appropriate Adults and defence legal representatives within these processes are further examined.

This chapter also examines the complexities of what constitutes a clear and reliable admission, and the fact that young people are expected to understand often complex legal issues when providing an account to the police. A number of cases where these complexities have resulted in arguably the unnecessary prosecution of a young person are considered, and the existing rigorous criterion is contrasted with the less demanding admission criterion adult offenders are currently subjected to.

Chapter Six further explores the amplified admission criterion in the controversial Crime and Disorder Act 1998, and why the present statutory regime, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), adopted this rigorous criterion despite the then Conservative-led Coalition Government's intention to simplify out of court procedures and increase discretion within decision making processes. This chapter also considers the anomalies in the existing statutory regimes concerning admissions, notably the radically different requirement under the Youth Conditional Cautioning protocol that an admission does not have to be immediate and a young person does not have to admit all elements of the offence.

The mandatory admission criterion is further considered in this chapter as potentially in conflict with other statutory obligations to ensure that the welfare of a young person is a primary consideration within diversionary processes, and whether it is especially disadvantageous for young BME people who are arguably less likely than white youths to willingly engage with the police. Other factors which may be of relevance when an admission is not made are further examined, including young people's often conflictual relationship with the police and other authority figures, wider cultural factors, and the fact that they are statistically more likely to have offended with at least one other of a similar age, and thus have a greater fear of inculpating another if they make an admission.

Chapter Six also considers the standard of admission for a diversionary outcome in other jurisdictions, and whether these may be more suitable

alternatives to the existing statutory criterion. It also examines the standard of admission required in alternative restorative processes, especially in Northern Ireland where Youth Conferencing takes place, and was recently recommended by some commentators as a suitable model for England and Wales.

Chapter Six also considers the practical benefits of the admission criterion for decision makers, and whether some form of admission of wrongdoing may in fact enhance young people's autonomy and citizenship, and is an important 'temporal aspect of responsibility' within criminal justice processes.

Chapter Seven sets out a thematic analysis of the views of relevant stakeholders within the context of the research questions. This chapter also considers whether the mandatory admission criterion is a necessary, proportionate or reasonable pre-requisite for young people who commit low level offences to secure an out of court disposal. Suggested alternatives to existing practices which may better enable the diversion of young people who offend from formal processes wherever possible are considered.

1.3 Terminology

The power and impact of justice language is routinely influenced by 'moral entrepreneurs' (Coyle 2013:xiii), and the language used to define young people who fall within the criminal justice system has at times construed children in a castigatory manner (Jones, 2010:345) in order to sanction punitive policies.

There is no legal definition in England and Wales of the term ‘youth’ and terminology for children and adolescents who fall within the criminal youth justice system has historically varied from descriptions of ’children’, ‘juveniles’, ‘young offenders’ and more recently ‘young people who offend’.

At present the youth justice system is defined as a system of criminal justice in so far as it relates to children and young people (section 42(1) Crime and Disorder Act 1998) and there are several statutory definitions of young people, including ‘children’ (those aged 10-13 years - s.107(1) Children and Young Persons Act 1933); ‘young people’ (those who have attained the age of 14 years and are under the age of 18 years - s.101(1) Children and Young Persons Act 1933); ‘juveniles’ (those aged 10-17 years in the context of detention at a police station and bail hearings - s.37(15) Police and Criminal Evidence Act 1984, Code C paragraph 1.5); ‘juveniles’ (those aged 10 – 17 years for the purposes of the Youth Court – s.29 Magistrates Court Act 1980); and ‘child’ as anyone under the age of 18 years (s.105(1) Children Act 1989 and section 65(1) Children Act 2004). Article 1 of the United Nations Convention on the Rights of the child also defines a child as any human being under the age of 18 years.

Wherever possible this thesis refers to young people aged 10-17 years within the youth justice system as ‘young people who offend’, which reflects both current vernacular and an arguably less negative label than some earlier definitions.

2.0 CHAPTER TWO: DIVERSION AND ADMISSIONS

'The path to hell is paved with good intentions' (Bullington, et al, 1978:71)

2.1 Introduction

This thesis seeks to place the evolution of the police caution and other out of court disposals into an historical context, and explore why an admission has become a central tenet of diversionary policies in England and Wales. It also seeks to explore the views and knowledge base of relevant professionals - police, civilian interviewers and legal representatives – concerning their understanding of how the admission criterion currently operates within diversionary processes, and their own practices concerning admissions within diversionary processes. The conventional notion of 'diversion' requires however a wide construction and should be treated with some circumspection (Koffman and Dingwall, 2007).

2.2 Definitions of Diversion

There is no definitive definition of what the diversion of a young person who offends from entering the formal court system is, or what they are to be diverted to, and notions of diversion have oscillated between the desirability of no intervention of any type, to informal and non-recordable diversion, diversion away from the Youth Court but towards a formal and recordable interventionist system, and diversion from prohibited behaviours (Goldson, 2000; Newburn and Souhami, 2005).

Despite the weight policy makers have placed on the probative value of diversion within youth justice practices and procedures:

> ‘Considering how ubiquitous the concept is in the youth justice sphere, the lack of a cogent definition of ‘diversion’…is remarkable’ (Kelly, 2014:125).

Diversion has alternately been categorised or classified as:

> ‘The channelling of cases to non-court institutions, in instances where these cases would ordinarily have received an adjudicatory (or fact finding hearing) by the court’ (Nejelski, 1976:393);
>
> ‘a flagpole around which radicals and reformers can still hang their colours, can push forward initiatives and innovations at the margins of the juvenile justice arena’ (Pratt, 1986:230);
>
> ‘the idea of a system of different responses’ (Dingwall and Harding, 1998:2);
>
> ‘a convenient shorthand for a wide range of decisions designed to divert people from crime, from court and from custody’ (Goldson, 2008:147);

and

> ‘The process of keeping offenders and other problem populations away from the institutional arrangements of criminal justice or welfare’ (Lee, 2013:102).

Recently, the use of the term ‘diversion’ has fallen out of favour, and there is increasing use of the alternative ‘out of court’ disposal (Ministry of Justice, 2010a; Youth Justice Board for England and Wales, 2014). This thesis uses both terms interchangeably at times, intending to describe those processes where a young person is not charged and put before the Youth Court, and is instead offered some type of formal or informal alternative which may or may not involve another form of system contact.

2.3 Diversion and formal system contact

Though offering a mechanism for avoiding prosecution, formal diversion results in a recordable criminal sanction and subsequent criminal record, which may not necessarily be immediately expunged (Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975). Formal diversion from the Youth Court thus frequently falls short of diversion from the criminal justice process in its entirety (Goldson, 2000) and many of the outcomes this thesis refers to as ‘diversionary disposals’ are arguably in fact sanctions and not truly diversionary at all - this distinction is acknowledged in this thesis.

The formalisation and expansion of diversionary practices has on occasion displaced the use of non-recordable informal measures, and paradoxically resulted in the net-widening (discussed further at paragraphs 4.6, 4.8. 4.14, 4.20-4.22.2 and 5.3) and escalation of young people into the criminal justice system (Austin, et al, 1981; Cohen, 1985; Reid, 1997; McMahon, 1990; Dingwall and Harding, 1998; Goldson, 2000; Bateman, 2002; Ministry of Justice, 2010a).

It is also seen by some as a highly interventionist process, which produces or consolidates delinquent identities (Goldson, 2000:43) fosters desistance amongst young people as a consequence of negative or adversarial police contact (McAra and McVie, 2007) and:

> ‘compromises the right of defendants to be presumed innocent, relieves the prosecution of the burden of proving guilt, and may bring intolerable pressure to bear upon those eager to escape the police station or fearful of the prospect of prosecution to admit an offence they may not have committed (Ashworth and Zedner, 2008:25; see also Dingwall and Gillespie, 2007).

Diversionary measures are also primarily sub-judicial processes operated in the main by the police, affording them vast discretionary power as both interviewer and adjudicator in determining and administrating out of court disposals (Hinds, 2007; Wells, 2007; Independent Commission on Youth Crime and Anti-Social Behaviour, 2010). Such measures accordingly have the potential to jeopardise established principles of procedural fairness (Eliarts and Dumortier, 2003; Dingwall and Gillespie, 2007; Reiner and Newburn, 2007; Padfield, et al, 2012; Scheuerman and Keith, 2015; Barnes, et al, 2015).

Formal diversionary measures which result in a recordable sanction are also on occasion imposed to primarily facilitate welfare orientated intervention, such as assistance with housing, education, skills, health, drug use, and adverse peer influence. These measures arguably fall within Platt’s (1969)

critique of the 'child-savers', whose nineteenth century initiatives to benevolently manage troublesome youth inadvertently gave rise to the adverse notion of the juvenile delinquent and concomitant criminalisation through the establishment of special judicial and correctional institutions.

Goldson argues against formal system contact wherever possible, even by way of diversionary measures or targeted early intervention, and suggests that:

> 'There is *substantial evidence* to suggest that early intervention via *youth justice systems* is counter-productive when measured in terms of crime prevention and community safety and, as such, it fails the public interest…Empirical *evidence* reveals that early intervention via *youth justice systems* can expose children and young people to the prospect of unnecessary harm and impose iatrogenic effects' (Goldson, 2013a:2, see also Gatti, et al, 2009).

2.4 Rehabilitation of diversion?

Conversely, Newburn argues it is timely to rehabilitate the notion of diversion from the one-sided debate of the 1990s (Newburn, 2011). Although system contact is considered by some as inherently criminogenic (McAra and McVie, 2005, 2007), diversion by way of a formal recordable diversionary disposal outside of the Youth Court has also been considered:

> ‘cost effective, proportionate and works in the sense that young people who are cautioned are less likely to be reconvicted than those who are prosecuted’ (Evans, 2008:147).

Notwithstanding a formal diversionary disposal still involves some system contact and an official antecedent record, there is other research which suggests diversion can have a positive effect on recidivism (Wilson and Hoge, 2012). There are also other practical benefits when a young person is diverted away from the Youth Court, as they avoid the ordeal of being formally charged, are spared the stresses of the Youth Court, and are not subjected to a recordable conviction or the rigours of any sentence imposed.

Although the limitations and deficiencies of diversion by way of a formal recordable disposal are acknowledged, as well as divergent research concerning the efficacy of informal restorative diversionary measures (Lynch, 2012), whilst formal diversion remains - and is likely to remain - a core tenet of diversionary practices in England and Wales, this thesis seeks to draw attention to fundamental limitations in the current regime, namely the mandatory admission criterion.

3.0 CHAPTER THREE: THE RESEARCH DESIGN

3.1 Key Research Questions

I. Is the admission criterion an unnecessary barrier for young people who have committed a low level offence gaining eligibility for a diversionary disposal?

II. If so, why are some young people not admitting an offence when it is often in their best interests to do so?

III. Are there are alternative criterion or amendments to existing practices which may better facilitate young people gaining access to diversionary outcomes?

Diversionary processes in the field of youth justice have attracted considerable political and academic interest, and consequently a body of substantial published material is available. Despite however the central importance of the admission criterion to these processes, there is seemingly an absence of identifiable literature or data concerning how it operates within these processes.

This thesis seeks to re-position the admission criterion into mainstream youth justice academic discourse and examine the history of both diversionary processes for young people who offend, and the concomitant development of the admission criterion as a gateway or barrier to an out of court disposal. It traces the trends and rationales as to how the police caution developed from a highly discretionary and informal practice to a

more formal and rigid process, and seeks to identify when and why and admission became a mandatory pre-requisite for a formal out of court disposal.

It also seeks to identify whether young people are unnecessarily forfeiting eligibility for an out of court disposal for the sole reason that they do not make an admission, and if so, for what reasons. It additionally seeks to explore whether the mandatory admission criterion for young people who commit a low level offence is a necessary, proportionate and reasonable pre-condition, and whether any alternative criterion or amendments to existing practices may better facilitate young people gaining access to diversionary outcomes.

3.2 Methodology

There is never only one ideal research method (Nelken, 2007), and given the nature of the research questions and the absence of other research which has examined the admission criterion within diversionary processes, in order to fully understand the admission criterion and its centrality within diversionary processes it was necessary to consider the historical, social and biographical aspects of both the development of out of court disposals as well as the development of diversionary criterion for eligibility - or to explore diversion and admissions through the 'sociological imagination' (Wright Mills, 2000).

Criminology is a genuinely interdisciplinary research field' (Meuser and Löschper, 2002:26), and a multi-method approach was necessary to both

broaden the depth of research but also complement and integrate the research findings (Marshall and Rossman, 1999). Research undertaken includes a literature review, an original analysis of secondary sources, the examination of primary legislation and policy documents to identify how the admission criterion developed and what its current status is within diversionary practices, and the identification of what, if any, data there is relating to whether the admission criterion may prevent some young people unnecessarily losing the opportunity to receive a diversionary disposal.

In addition, framework analysis was used to facilitate and interpret the findings from two data and information strategies - a questionnaire and follow-up interview. These two strategies were devised in order to best achieve data rich responses from key participants in diversionary processes. Given that the police interview is for many young people the only venue and opportunity to make an admission and gain eligibility for an out of court disposal, police officers and legal representatives were identified as key participants. For practical and professional/ethical reasons it was not feasible to interview young people themselves (as discussed below at paragraph 3.8).

The nature of these mixed research methods falls outside of any strict definition of either quantitative or qualitative data, and draws on elements of both research processes. The questionnaire and interviews were primarily, but not exclusively, a quantitative research method intended to generate ‘facts’, however it also sought to uncover patterns, behaviours, opinions and

other defined variables. As such, it in part also comprises qualitative research, which ordinarily seeks to explore trends, thoughts and opinions (Bachman and Schutt, 2014). Quantitative and qualitative research methods are also arguably both poles on a multi-dimensional research continuum (Bazeley, 2009) and any attempt to wholly distinguish them is both artificial and unhelpful to the researcher (Hagan, 2014).

This research was also influenced by reflective-action research as a primary theoretical base, as it intended, through the participation of practitioners in diversionary youth justice procedures, to invite them via the questionnaire and follow-up interviews to assess and examine the mandatory admission criterion within existing processes and:

> ‘arrive at recommendations for good practice that will tackle a problem or enhance the performance of the organisation and individuals through changes to the rules and procedures within which they operate’ (Denscombe, 2002: 2; see also Coghlin and Brannick, 2010).

This research falls outside however of true action research, as the key participants – police officers and legal defence solicitors - were outside of this researcher’s own profession, and any findings were unlikely to affect any change within the participant’s own practices.

The multi-method research further sought to identify what was distinctive in the practice and discourse of these key participants - those findings were then triangulated with the original analysis of primary and secondary

sources and the literature review in order to contextualise the admission criterion within ‘a history of the present’, and illuminate and understand the rationales and dynamics of how it operates within the sphere of youth justice (Garland, 2001: 1-26). Triangulation is also a useful means of integrating multiple forms of evidence which can often engender more meaningful research findings (Jick, 1979).

3.3 Literature review and original analysis of secondary sources

This thesis considered not only ‘white’ literature such as academic publications, reported case law, international human rights treaties, conventions and rules, and Youth Justice Board policy and statistical publications, but also sought out where available ‘grey’ literature, or:

> ‘manifold document types produced on all levels of government, academics, business and industry in print and electronic formats that are protected by intellectual property rights, of sufficient quality to be collected and preserved by library holdings or institutional repositories, but not controlled by commercial publishers i.e., where publishing is not the primary activity of the producing body’ (Schöpfel, 2013:12).

Grey literature examined within this thesis included Home Office Circulars, Government Research Reports, Royal Commission Reports, Police Enquiry Reports, Association of Chief Constables (ACPO) Guidelines, regional police policy documents, non-reported case law and other doctoral theses’. The Bodleian Library at the University of Oxford held much of this material

and kindly granted unrestricted access. When this material was not available at the Bodleian Library, it was sourced alternatively between the National Archives and the British Library.

This material was sourced both by physical review of hard copy publications in the criminology, jurisprudence, law and youth justice sections of the Bodleian Library, but also using the Oxford University Solo/OxLip search engine, the Westlaw and EBSCO databases and the University of Bedfordshire DISCOVER catalogue. Other search engines included Google Scholar and the Crown Prosecution Service intranet legal-resource, with the most frequent search terms used including ‘youth diversion’, ‘youth caution’, ‘youth admissions’, ‘police caution’, ‘informal caution’ ‘reprimand and Final Warning’ and ‘youth conditional caution’. ‘Juvenile’ was substituted for ‘youth’ during the searches in order to access earlier and international material. The term ‘police caution’ proved the most challenging search term, as in addition to an informal or formal sanction/disposal ‘police caution’ also describes the mandatory explanation of a person’s rights the police must make after an arrest, unless impractical to do so.

These search terms were also entered into the electronic search engines of a number of journals, including *Youth Justice: An International Journal*, *The British Journal of Criminology*, *The Howard Journal of Criminal Justice*, *The Criminal Law Review*, *Contemporary Issues in Criminology, Criminology and Criminal Justice, European Journal of Criminology* and the *Journal of Mixed Methods Research.*

3.4 Identifying research participants

This research was intended to examine how the admission criterion affects young people who have offended, and the most potentially probative line of enquiry was to interview those young people who had been accused of committing a low level offence and who were *prima facie* eligible for a diversionary disposal, but were charged and put before the Youth Court for the sole reason that they did not make a satisfactory admission. For practical and ethical reasons (as discussed at paragraph 3.8) it was not possible to undertake that research.

The qualitative researcher is however encouraged to:

> 'look through a wide lens searching for patterns of interrelationship between previously unspecified sets of concepts' (Brannen, 1995:4),

and as the most significant element of diversionary processes is arguably a young person's police interview - as this is usually the only opportunity available to make an admission - access was sought to police officers and civilian interviewers involved in the interview process, as well as defence solicitors and accredited police station legal representatives who advise and represent young people in police interviews.

One regional Police Force Authority was approached with a request for direct access to police officers of all ranks and civilian interviewers, by way of face to face interview and completion of a semi-structured, self-administered survey. Consent was granted after an Assistant Chief

Constable accepted, after considering a draft article prepared by this researcher summarising the literature review and key research questions, that there was a need for further research. That draft article was subsequently accepted for publication prior to submission of this thesis (Cushing, 2014).

The only pre-conditions imposed by this Police Force Authority were that their identity and that of any police officer or civilian interviewer who participated in any aspect of the research were not disclosed, and that the interviews were not tape recorded. This request was subsequently approved by the University of Bedfordshire Ethics Committee.

This regional Police Force Authority encompassed multiple counties, and for practical and resource reasons the research was confined to one particular county within this Police Force Authority. This county was selected as it was relatively representative of most other police regions, being sufficiently large and diverse, and due to previous professional relationships this author was able to efficiently secure participant consent for this research. The county had between 2012-2013 a population in excess of 600,000, the numbers of young people aged between 10-17 years who came to the attention of the police as a consequence of alleged offending was commensurate with national averages, and there were similarly no distinct variances in the use of diversion or prosecution outside of the national average (Office for National Statistics, 2013; Youth Justice Board, 2013).

There were however significant variations in the ethnic and socio-economic composition of this county. More than 20% of the city population identified itself as BAME (Black, Asian or another Minority Ethnic), however within rural areas this fell to between 3% and 7%. Similarly, 20% of local authorities within and near to the city region were categorised as amongst the most deprived nationally, whereas 10% of rural areas were characterised as the most affluent (Office for National Statistics, 2013).

Given these significant variables, access for the purposes of the questionnaire and follow-up interviews with police officers and civilian case interviewers was granted to the main city police station and one rural police station. It later became apparent however that the majority of police officers and civilian interviewers had been located at both police stations at some stage, and young people in custody were routinely transferred from the city police station to the rural police station on the occasions when the city cells were full, or they were taken directly there after arrest for the same reason.

Consequently, despite the considerable differentials within the city and rural areas concerning ethnicity and deprivation, and other research which has identified divergent practices between city and rural/semi-rural police areas, it was not possible to examine whether there were any identifiable divergent practices between the city and rural police stations concerning the admission criterion and the diversion of young people who committed low level offences. There were however a number of identifiable opportunities for other research which were likely to contribute to greater knowledge in

this under-researched field of youth justice, as discussed further in this chapter.

3.5 Questionnaire and interviews – police officers and civilian interviewers

The questionnaire was developed in order to elicit from police officers/civilian interviews their standard of knowledge and attitude concerning:

i. the statutory admission criterion;
ii. diversionary processes;
iii. features of the admission criterion during the diversionary process which may facilitate or hinder admissions;
iv. any amendments to the current regime which may best assist young people who offend to secure eligibility for an out of court disposal.

The content of the questionnaire was derived from a combination of this researcher's own professional experience, the initial findings from the literature review, collaboration with the thesis supervisor and also suggestions from other professionals during the peer review process. A draft police questionnaire and explanatory letter explaining its purpose was peer reviewed by a supervisor and another researcher at the University of Bedfordshire to ensure adherence to best practice guidelines (Fowler, 1995). It was then piloted on two police officers who were selected through an existing professional connection. Both officers had more than 15 years' experience and held the rank of Sergeant. This resulted in a number of

revisions, primarily concerning less use of *legalese* in some questions, and condensing the number of questions from 50 to no more than 30, after feedback that participants would be more willing to participate if the questionnaire was shorter.

A mixture of open and closed questions were used to gather both quantitative and qualitative data – quantitative data primarily concerning the experience of each participant in diversionary processes and interviewing young people as suspects. Qualitative data sought included their attitudes and methods concerning these processes, their relationship with other participants, and their views on the admission criterion within diversionary practices.

The Assistant Chief Constable who consented to this research - as well as the final draft of the questionnaire and the explanatory letter attached to each questionnaire - further advised that there was on average a response rate of less than 20% within his/her force for voluntary paper questionnaires of this type, and an even lower response for online surveys.

In order to achieve a higher response rate, the Assistant Chief Constable consented to the request that Case Directors at the two police stations - police officers who hold charging responsibilities and quality check all prosecution files before they are sent to the CPS - would make direct requests to police officers and civilian interviewers to complete the questionnaire, and the only selection process would that the candidate had previous experience of interviewing a young person. Case Directors were

identified as the most suitable conduit to identify potential respondents, as through the nature of their role also had contact with the greatest number of possible candidates. The University of Bedfordshire Ethics Committee subsequently approved the explanatory letter (Appendix 1), questionnaire (Appendix 3) and these research methods.

This approach resulted in 52 requests and 32 responses – an overall return rate of 61% which was considerably higher than typical responses to surveys of this nature (Hagan, 2014). Three responses however were only partially completed and therefore excluded from analysis on the grounds that partial responses may adversely affect the overall thematic analysis of responses and data calculations. Of the completed responses 21 were from respondents primarily located at the city police station, and 8 from officers usually based at the rural police station. 4 responses were from civilian interviewers, 17 responses were from police officers with less than 5 years' experience and 17 responses were from police officers with more than 5 years' experience (Appendix 7).

Arrangements were made for officers to complete the questionnaire in a room next to the Case Directors' office. It was subsequently disclosed by a Case Director that some officers (estimated between 6 and 8) completed the questionnaire together at the same time, and it is thus not known whether they discussed the questionnaire prior to completion, and if so whether their answers may have been influenced by any discussions amongst them. The Case Directors advised that upon completion of the questionnaire participants posted them into a secure box file which was later

forwarded to this researcher via the DX postal system. Upon receipt all questionnaire responses (and the notes from the follow-up interviews) were stored in a secure cabinet in this researcher's office.

The Case Directors were further designated by the Assistant Chief Constable to identify candidates for a follow-up interview, with the only selection criterion that they had experience of interviewing young people as suspects. 22 police officers, 6 civilian interviewers and 5 officers of the rank of Sergeant or above agreed to participate in an interview (Appendix 7). This was lower than the response rate for the questionnaires, and the Case Directors advised that the police officers who did decline to participate all did so only due to other work commitments.

The interview questions sought to add descriptive and thematic data to the primarily quantitative data obtained from the questionnaire. The content of the interview questions was derived from a combination of this researcher's own professional experience, the initial findings from the literature review, initial findings from the questionnaires, collaboration with the thesis supervisor and also suggestions from other professionals during the peer review process. The interview schedule contained 30 questions (Appendix 5).

Interviews took place over five days during a four week period at the city police station, as there were operational matters which prohibited access during the research period to the rural police station. 26 of the interviewees

also had experience working at the rural police station however. Of the 22 police officers, 12 had less than five years' experience.

Each interview took place in a closed room opposite the Case Directors' office, where privacy and confidentiality were maintained. Of the 33 interviewees, 14 had previously met this researcher either at court or previously at the police station for a separate professional matter, and another 9 indicated that this researcher may have previously dealt with one of their cases. The quality of the answers in these interviews must thus be considered in this context, as interviewee's may conceivably have been less likely to express certain views which fell outside of their own organisation's policies and code of conduct, and may have been more candid if interviewed by an independent researcher at a location outside of the police station.

Each interview lasted for approximately 25 minutes. The only personal details retained from each interviewee were whether they were a civilian interviewer or police officer, length of service, rank, and experience interviewing young people as suspects. Handwritten notes were made of all responses and each response was identified with the following alpha-numeric codes beginning with:

i. JPO: junior police officer with less than 5 years' experience;
ii. EPO: experienced police officer with more than 5 years' experience;
iii. CI: civilian interviewer.

As civilian interviewers were a recent initiative none had more than 5 years' experience at that time, and it was not necessary to distinguish their experience in the same manner as police officers.

Further details concerning the categories of respondents are contained within Paragraph 7.5 and Appendix 7 of this thesis.

3.6 Questionnaire and interviews – defence solicitors/legal representatives

A separate questionnaire was devised for defence solicitors and accredited police station legal representatives (non-qualified solicitors who represent suspects in custody), which although intended to answer the same research questions being sought of police officers and civilian interviewers, was necessary in order to reflect their separate role from the police, as well as their distinct experiences. The author of this thesis was able to use existing professional contacts with criminal defence solicitors and accredited legal representatives to assist with the drafting, peer review and completion of the questionnaire. A draft questionnaire was piloted on one local solicitor, who made minor suggestions for revision, primarily concerning the re-drafting of some leading questions to open questions.

The peer reviewer also advised that many legal representatives would be unlikely to participate in this research due to a number of factors, including the considerable work pressures most were experiencing at that time, the additional anxiety many felt concerning proposed changes to legal aid funding arrangements - which if implemented would reduce the number of local firms by more than three quarters - as well as the fact that this

researcher was at that time a CPS employee and may intentionally or inadvertently negatively stereo-type defence legal representatives.

In anticipation of a low response rate and in order to gain as much information from local solicitors and accredited legal representatives as possible, the legal representative questionnaire was significantly larger than the police questionnaire and contained 50 questions, as opposed to the police version which contained 30 questions. Although this length may have potentially dissuaded some respondents from completing it, the benefits of a longer questionnaire were initially considered to outweigh this. This variance did however subsequently cause difficulties during the Survey Monkey collation stage, and additional coding and thematic analysis of the responses was undertaken manually using an Excel spreadsheet in order to code and analyse the responses.

In order to examine the relationship between police and legal representatives during diversionary processes, and restrict the research to practices in one county, legal representative's unknown to this author who practiced in another area were not pursued. Although existent professional relationships afforded expeditious access to this cohort, it also potentially undermined the integrity of some responses, as there was the possibility that some of these professionals would be reluctant to admit to a lack of procedural or technical knowledge given the professional embarrassment this may cause them. The University of Bedfordshire Ethics Committee subsequently approved the explanatory letter (Appendix 2) questionnaire (Appendix 4) and the follow-up interview questions and arrangements.

Requests were made both in person and in writing to individual solicitors practicing within the same region as the Police Force Region. 31 questionnaires were personally handed to legal representatives over the course of three months, another 50 questionnaires were left in the advocates' room at one Magistrates Court with an explanatory letter, and another 30 were sent to 6 local law firms who employed accredited police station representatives. Attached to each questionnaire was an explanatory letter and pre-paid envelope with the return address of a PO Box which was hired for this purpose and all responses were returned anonymously.

Of the 111 questionnaires sent out only 23 were returned, with 11 returned personally and the remaining 12 sent via the postal box. Of these responses, 20 were from solicitors and 3 from accredited legal representatives. This was a return rate of only 26%, and would likely have been even lower but for the existence of professional relationships with some respondents and the opportunity to chase responses, which facilitated the return of some questionnaires. All of the returned responses were complete. The 3 accredited police station representatives who answered the questionnaire all had more than 5 years' experience, 3 responses were from qualified solicitors with less than 5 years' experience and 15 responses were from qualified solicitors with more than five years' experience (Appendix 7).

Personal requests were made to 22 local defence solicitors and three accredited legal representatives for participation in an interview. All were identified from personal knowledge that they had experience representing

young people. 14 solicitors subsequently consented to an interview, which took place over a 6-week period at a local Youth Court either during a recess or at the end of the court sitting. All had more than 5 years' experience (Appendix 7). Two of the interviewees disclosed they had not completed the questionnaire and this was not a follow-up interview. No accredited police station representatives agreed to participate. The solicitors who participated came from 6 of the 10 local firms which undertook publicly funded police station representation within the county.

The content of the interview questions was derived from a combination of this researcher's own professional experience, the initial findings from the literature review and questionnaires, collaboration with the thesis supervisor and also suggestions from other professionals during the peer review process. Although the legal advisor questionnaire had been considerably larger than the police questionnaire, given the time pressures on interviewees and also the practical benefits of corresponding police and legal advisor questions, the legal advisor interview questions were contained to 30 questions - the same number as the police interview questions.

Each interview took place in a private room at the local Magistrates Court. Given the police had refused consent for the tape recording of interviews, no request was made to tape record these interviews either, as this disparity may have undermined the participants' confidence in the independence and integrity of the research. One interview was subsequently excluded from

analysis as the interviewee later indicated that he/she no longer wished to participate in this research due to a professional conflict.

Each interview lasted approximately 40 minutes – significantly longer than the police interviews. The legal representatives were all generous with their time given their work pressures, and expressed a genuine interest in the research questions. The only personal details retained were the number of years the interviewees had represented young people at the police station, and how often. All interviewees requested anonymity and no information identifying their name or the firm they practiced at were recorded.

Handwritten notes were made of all responses and each response was identified with alpha-numeric codes beginning with:

i. JS: junior solicitor with less than 5 years' experience;

ii. ES: experienced solicitor with more than 5 years' experience;

3.7 Data analysis

Analysis of the research data findings was undertaken through the characteristics of framework analysis - an analytical approach using a set of codes organised into categories through charting and indexing (Ritchie and Spencer, 1994). This facilitated summarising and reducing the data in a way which supported the research questions, identified explanatory clusters of information and a comprehensive and transparent analysis (Gale, et al, 2013).

The questionnaire responses were initially collated using the 'Survey Monkey' tool, which automatically populated the answers to the closed questions into percentiles and graphs. This was the primary tool used for charting and indexing the closed question responses, so that a spreadsheet matrix could be developed. Some questions invited respondents to go beyond the closed questions and answer 'other' if they had an additional response, and write down their full response, and at that stage Survey Monkey simply collated these as 'other answers'.

Responses from the questionnaires were then coded and recorded in a Word document and the data extrapolated from this coding subsequently entered into an Excel spreadsheet. Coding was initially attempted using CAQDAS software, however given the number of open ended questions in the questionnaire, the variance of the interview responses, and the fact that the numbering and drafting between the police and legal representative questionnaires differed (despite making the same enquiries) it was more efficient to code these other responses manually using Word and Excel.

Coding of the answers to the open questions in the questionnaire was undertaken by identifying any response either considered to be important or relevant, or was a response to an 'other' question, and these responses were given labels, or 'interrogating data categories' (Gale, et al, 2013:117). They were then integrated with the Survey Monkey findings into the Excel spreadsheet, and the statistical and thematic research findings extracted from this spreadsheet. This resulted in identifiable trends concerning the research questions.

For example, in Question 6 of the police questionnaire respondents were asked to comment on whether they felt able to comply with competing and sometimes contradictory pre-interview disclosure guidelines, and invited to comment further should they wish. Two respondents added written comments – one respondent added:

> ‘every case is different and sometimes I can, and sometimes I can’t. It often depends on who the brief [legal representative] is’ (JPO4),

and another:

> ‘sometimes – depends on who the DP [detained person] is, who their solicitor is and what type of case it is’ (JPO6).

These responses were both coded as ‘sometimes’ added to the Excel spreadsheet, which included ‘facts of the offence’, ‘dependent on young person’s circumstances’ and ‘dependent on legal advisor’. A similar question was also asked in the police (question 19) and legal representative interviews (question 19) and those responses also similarly labelled and added to these sub-columns.

Likewise, question 1 of the police questionnaire asked respondents to number from 1 to 12 the suggested reasons why a young person does not make an admission. Answer 12 however asked for any ‘other’ reason, and these ‘other’ reasons were also coded separately as they could not be automatically populated by Survey Monkey. There were two further reasons offered by the respondents: ‘playing the system’ and ‘waiting to see if they

can get off with the offence by saying nothing' - these were both coded as 'strategic'. During the interview phase one other reason was also offered, namely that Asian girls were less likely to make an admission possibly due to fears that offending may contravene notions of honour. This was coded as 'cultural' and sub-coded again as 'Asian girls – honour'.

Coding of the interview responses was also undertaken by identifying any response either considered to be important or relevant and these responses given labels, or 'interrogating data categories'. For example, question 30 of both the police and legal advisor interviews asked participants if they had any 'views on any changes to current practices that may improve opportunities for young people to make an admission?' This same question had also been asked at question 30 in the police questionnaire and question 50 in the legal advisor questionnaire.

All of the responses were initially coded as either 'yes', 'no', 'maybe', and 'not sure'. The participants were also asked in the questionnaire interviews to explain their response, and thematic data was extrapolated from these responses into the Word document and then coded and entered into separate police/defence columns in the Excel spreadsheet. For example, thematic data from the 'yes' responses were identified and coded as 'return decision making to the Custody Sergeant', 'get more experienced officers to undertake interviews', 'improve pre-interview disclosure' and 'improve pre-interview explanatory guidelines'.

Thematic analysis of responses to the police and legal representative questionnaire and interviews were entered as codes into the Excel spreadsheet which already incorporated the Survey Monkey data, and graphs were then produced to adduce some (but not all) of the research findings [Figure 1, Chapter 7.5; Figure 2, Chapter 7.12]. Graphs were not used however to reflect all of the research findings as they would not have adequately reflected the complexity of the data and thematic findings, and they have instead been explained in written form throughout Chapter Seven.

Analysis of the answers to the open questions in the questionnaire and interviews required an element of subjective interpretation, and there were risks of errors or omissions in the coding and thematic analysis of the responses. Efforts were made to neutralise and counterbalance this through the framework analysis research method, which encourages coding, charting and indexing, rather than intuitive analysis. This method cannot however guarantee that subjective interpretation has not influenced data analysis, despite the best efforts of this researcher.

During interviews with police and civilian interviewers it also became apparent that some responses were not strictly in response to the research question which solely concerned young people who offend, and answers were sometimes reflective of what happens to adult suspects as well. This was especially common when interviewees were asked at question 20 of the interview schedule about why some young people answer ‘no comment’ in their police interviews. Although this was identified during the interviews and efforts made to confine the answers to the research question, it is

conceivable that some of the questionnaire and interview answers are not exclusively in response to young people who offend, and this may have adversely affected the findings.

3.8 Ethical considerations

This thesis was subject to approval and scrutiny from the University of Bedfordshire Ethics Committee, as well to the approval of third party professional bodies, namely the relevant Police Force Authority and Crown Prosecution Service. Ethical challenges included ensuring the informed consent of all participants was obtained, maintaining confidentiality, and managing any potential breaches of confidentiality in the event of certain disclosures.

All participants were provided with a written disclosure document setting out the purpose of the research and that their responses would be anonymised within the research findings (Appendix 1 and 2). It also explained however that as a consequence of the duality of the professional and academic role of this researcher, this anonymity did not extend to disclosure of any 'significant' breach of ethical or procedural obligations, which may be referred either a senior police officer or The Law Society for England and Wales. 'Significant' was defined as sufficiently great or important to be worthy of attention (Oxford Dictionary definition).

Participants were asked to sign and return the disclosure document with the questionnaire responses as an assurance they accepted this pre-condition,

or sign and return it before they participated in an interview. Throughout the research there were no significant disclosures however.

Regrettably, it was not possible to approach or interview any young people who came within this cohort, as this was outside of the professional boundaries imposed on this author, who as a prosecutor was prohibited from direct communication with young people within the criminal justice system outside of any reasonable communication concerning alleged offending, procedural matters or issue of law. There was also the additional complexity that any future offending by a young person after an interview with this author which resulted in a prosecution, may later result in professional embarrassment.

The improbability that young people would consent to participate in an interview with a prosecutor was a further factor in not pursuing this enquiry. For similar reasons it was considered impracticable to interview those who had acted as an Appropriate Adult. It is hoped however that this thesis generates a greater interest in this neglected area, and further research is undertaken which can engage directly with young people and examine why they do not make an admissions and lose eligibility for a diversionary disposal.

For practical reasons, primarily resources, it was also not possible to engage an independent third party to facilitate and conduct interviews with young people.

3.9 Access to primary data sources

Analysis of primary documents such as police custody records, interview tapes and prosecution witness statements would have similarly adduced useful quantitative data concerning whether and why some young people are unnecessarily entering the formal criminal justice system as a consequence of the admission criterion. This would most likely elicit some data concerning the length of their period in custody before interview, the time the interview took place, quality of any explanation of diversionary procedures given, quality of pre-interview disclosure, the nature and tone of the interview, type of questioning, competency of the Appropriate Adult and legal advisor, the duration of the interview, the quality of any answers given, and whether any of these variables were contributory factors when young people did not make an admission (or a satisfactory admission) to the police.

There were insurmountable barriers however to access this material. It is the property, at various times in the criminal justice process, of both the police and Crown Prosecution Service. A request was made to one Police Force Authority, and although they consented to access, the Crown Prosecution Service (CPS) was unable to make a decision as to whether consent should be granted within the necessary timescales, in part because this researcher is an employee of the CPS and subject to the Official Secrets Act 1989, and has a statutory duty of confidentiality concerning all material dealt with.

Additionally, this researcher was likely to have been involved at various stages in either the charging process or prosecution at court of some of this cohort, and was also likely to have had some previous professional contact with the relevant police officers. As such, any analysis or interpretation of this primary data may not have been satisfactorily independent.

3.10 Limitations of the research

In addition to the ethical barriers concerning obtaining interviews with young people and the lack of access to primary data sources, the questionnaires and interviews examined the practices, attitudes and knowledge base of a very small sample of police officers, civilian interviewers and legal representatives from one county within one Police Force Region. Given this, the findings are indicative rather than conclusive, especially given the established body of research which identifies wide geographical variances in police diversionary practices (even within a singular Region), and this is a consistent trend in diversionary youth justice (Royal Commission on the Police, 1962; Patchett and McClean, 1965; McLintock and Avison, 1968; McClintock and Avison, 1968; Somerville, 1969; Steer, 1970; Ditchfield, 1976; Tutt and Giller, 1983; Laycock and Tarling, 1985; Giller and Tutt, 1987; Pitts, 1990; Hirst, 1994; Goldson, 2000; Bateman, 2002; Ball, 2004; Office of Criminal Justice Reform, 2010).

The thematic findings from the responses in the questionnaires and interviews are an assessment of majority sentiments, and as such only speculative rather than definitive. There is also the unintended possibility

that as this researcher was known to many of the respondents and interviewees as a CPS employee, some may have been reluctant to acknowledge any deficiency of knowledge, or admit to a view which was outside of their organisation's public ethos. The circumstances in which the police questionnaires were completed and secured was in hindsight imperfect, as it became subsequently known that some police officers completed them in each other's presence, and collusion or discussion may possibly have influenced their responses.

The police and civilian interviewers who participated in this research were selected in advance by the Case Directors. Although this was considered an expeditious method of ensuring a high participation rate, and a verbal assurance was provided that the only ground for selection was availability and some previous experience interviewing young people, it cannot be discounted that the Case Directors judiciously sub-selected potential participants, and excluded those whose answers may have embarrassed the Police Force Region in some way.

As a consequence of the practicable limitations of this research there is regrettably no examination of gender within the admission criterion, and whether the findings from the literature review and this research are equally applicable to boys and girls. There has similarly been no consideration of socio-economic, educational or mental health factors which may influence whether a young person makes an admission or not when it is seemingly in their best interests to do so.

Although the proper conduct of critical enquiry mandates that:

> ‘those concerned with research should be objective and vigilant as well as sympathetic’ (Hirschi and Selvin, 1973:273-374),

there is also the possibility that this researcher’s own professional experiences in this field may have unintentionally influenced the nature of information sought, the tone of the interviews, and the interpretation of the responses. As such, these research findings – from the secondary analysis of the literature review, questionnaires and interviews – must thus be considered in the context of possible unconscious bias.

Despite these issues, the potential for bias was recognised from the outset and vigilance for objectivity, impartiality, accuracy and the elimination of error was continual throughout the research process. The multi-method research approach was also always intended to be the subject of convergent-discriminant validation – and the findings from each method triangulated to ascertain areas of similarity and divergence (Hagan, 2014:285).

Although some limitations and imperfections have been identified in the methodology:

> ‘If a student of research is afraid of making errors in research, then he or she should probably do none, because error is omnipresent… the question is not whether errors are present, but rather, whether reasonable attempts were made to acknowledge and/or eliminate the most obvious errors. Only when such errors so grossly compromise

> the accuracy of the findings and conclusions thereof should one attach other research' (Hagan, 2014:8).

Given the depth of the literature review and original secondary analysis, the primary research undertaken with certain relevant stakeholders, and the fact that the findings are not reliant on one approach only, these research findings still arguably come within tolerable standards of validity and reliability, and contributes value and knowledge to this seemingly ignored area of youth justice practice and procedure.

4.0 CHAPTER FOUR: LITERATURE REVIEW: THE DEVELOPMENT OF THE POLICE CAUTION AND OTHER OUT OF COURT DISPOSALS FOR CHILDREN AND YOUNG PEOPLE WHO OFFEND

De Minimus non curat lex

'the law does not concern itself with trifles' (Law, 2015:183)

4.1 Introduction

It has long been enshrined in English law that not every misdemeanour must be formally sanctioned within the parameters of the formal criminal justice system, and alternative disposals are an accepted and legitimate outcome (Sharpe, et al, 1980; Ashworth, 1998; Dingwall and Harding, 1998). For young people who offend, diversion from formal proceedings has historically been a principal constituent of youth justice policy and procedure. This practice emerged and developed however without statutory authority, has oscillated between favour and criticism, and there has rarely been a period of sustained consensus or constancy of processes (Bernard, 1992).

Prior to the nineteenth century, enforcement of English criminal law was haphazard, without much sense of strategy and dependent on informal and amateur policing (Dingwall and Harding, 1998). The absence of official or reliable authorities to initiate and undertake criminal proceedings resulted in the decision to prosecute devolving primarily to an individual victim, ecclesiastical authority or local constable. A resort to a prosecution was one

of a number of routes available and non-formal disposals were common place, and often:

> ‘a natural choice rather than a kind of “diversion”’ (Dingwall and Harding, 1998:35),

often encouraged by the judiciary (Beattie, 1986) and ‘resorted to when other means had failed’ (Sharpe, et al, 1980:7).

4.2 Origins of diversion and the age of criminal responsibility

Prior to mid-nineteenth century legislative initiatives, there were few legal distinctions between the age of an offender, the offence committed and mode of trial or punishment (May, 1973: 99) and the liability of children and young persons within the criminal law was determined by judges as a matter of common law (*R v JTB (Appellant) (on appeal from the Court of Appeal (Criminal Division)* [2009] UKHL 20). English law had developed complex distinctions between phases of childhood and adulthood in order to determine the liability and culpability of children and young people who transgressed the law.

Blackstone’s seminal eighteenth century ‘Commentaries on the Laws of England’ (Blackstone, 1796) distinguished those under the age of twenty-five years into three stages – *infantia*, from birth to seven years of age; *pueritia*, from eight to fourteen; and *pubertas*, from fifteen years and upwards. The period of *pueritia*, or childhood, was again sub-divided into two equal parts; from seven to ten and a half was designated as *aetis*

infantiae proxima and from ten and a half to fourteen as *aetas pubertati proxima*.

During the first stage of *infantia* and the first half of *infantiae proxima* young people were not punishable for any offence, but were punishable if during the second half of *infantiae proxima* up to *pubertas* they were found to be *doli capaces* (capable of mischief and able to discern between 'good and evil'), but with mitigation for their age, and 'not with the utmost rigour of the law'. During the last stage of *pubertas* a young person was held to be as culpable as an adult, and subject to the same punishments.

The outcome for offenders aged less than twenty-one years was determined not just by their age, but was also distinguished by the gravity of the offence, with the commission of 'common misdemeanours' most likely resulting in avoidance of a formal sanction for all offenders aged between seven and twenty-one years (Kean, 1973). Felonies and capital crimes however exposed any person aged from seven years to the same processes as adults, as:

> 'the capacity of doing ill, or contradicting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgement. For one lad of eleven years old may have as much cunning as another of fourteen…though an infant may shall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury that he was *doli capax*, and could discern between

> good and evil, he may be convicted and suffer death' (Blackstone, 1796:13).

The first statutory distinction between children and adults within the criminal law was established in the Juvenile Offenders Act 1847 and the Summary Jurisdiction Act 1847, which devolved power from the judiciary to the magistracy to try children under the age of fourteen for most indictable offences. Offences ranging from petty larceny to felonies could be dealt with summarily, and children and young people were kept away from the more serious adult criminals at quarter sessions and the assize courts (Ball et al, 2001). This distinction, although in part intended to benevolently protect children and young people from the rigour and stigma of a public trial, as well as facilitate proportionate sentencing, established the precedent, which endures to the present day, that - unlike adults - young people do not have the inalienable right of trial by jury (May,1973:102).

Subsequently, distinctions between the punishment, sentencing and outcomes of adults and children and young people who offended were introduced in the Youthful Offenders Act 1854, which established Reformatory Schools as a residential alternative for children less than sixteen years convicted of an indictable offence, though an initial 14 days' custody was still served. Industrial Schools were subsequently also established to house the 'perishing class' - children aged between seven and fourteen years convicted of 'vagrancy offences' (Newburn, 2002:533).

4.3 The emergence of police powers and the 'informal' police caution

During the nineteenth century, and principally as a consequence of the establishment of organised police forces (Reith, 1938; Robinson and Scaglion, 1987), primary responsibility for decisions concerning the commencement of criminal proceedings progressively became the responsibility of regional police forces. Local authorities retained certain remit as prosecuting agencies for offences concerning Weights and Measures Acts, Education Acts and Public Health Acts. Notions though of what constituted a minor offence, or indeed what constituted criminality during this period is complex (Emsley, 1996; Newburn, 2003; Reiner, 2010). Certain communities, especially in poor rural areas, operated local justice processes arising from perceived inalienable rights superseding statute or common law (Christian, 1961), and 'various communities and social groups gave a wide degree of tolerance to other offences which state legislation decreed crimes' (Emsley 1983:115).

As the role and authority of the newly established police forces progressed, inevitably the police established, or arguably acquired by default, both the discretionary authority to determine the sanction when a minor, technical or trivial offence was committed, and the authority to resolve the matter by other means when entry into formal criminal justice processes was undesirable, but a positive action was considered necessary to denote some form of disapproval (Newburn and Reiner, 2012). This disposal developed in a 'spontaneous manner in different police forces at different times' (Dingwall and Harding, 1998:809) and by the mid-nineteenth century

discretionary police decision making in favour of the issuing an informal warning as opposed to taking no action or initiating a formal prosecution, became colloquially known as a ‘police caution’.

The practice of an informal police caution had no statutory or common law basis, was available to both young people and adults, and initially took the form of an informal warning or reprimand with no recordable sanction, made by a constable at street level, but could include extremely informal modes of policing (Davis, 1989) such as a:

> ‘the proverbial clip around the ear’ or ‘flick of a policeman’s rolled cape’ (Pearson, 1983:214), a ‘constabular rebuke or cuff’ (Simpson, 1968:123) or a night in the cells (Emsley 1983).

There was an absence of regulation or supervision of cautioning processes by senior officers or other bureaucratic officials and ‘depended very much on the individual policeman’s discretion’ (Emsley, 1983:139). The emergence of the police caution embodied the doctrine of ‘constabulary independence’; where every police officer, even the ‘rawest recruits’ had a right to enforce the law as he saw fit (McConville, et al, 1991:2)

The police caution did not operate without controversy however, and was not initially embraced with unqualified enthusiasm by the police. In 1833 the Metropolitan Police Commissioner strongly condemned any decision by a constable to warn and not summons to court an offender believed to have behaved in a disorderly manner, insisting it was the exclusive function of the judiciary to determine the sanction when an offence had been committed,

irrespective of gravity, and the issuing of a police caution, either formally or informally, exceeded the authority of the constable (Steer, 1970:54).

Despite the reluctance of the Commissioner to endorse the practice of the police caution, by the latter part of the nineteenth century most regional police forces had accrued virtual autonomy to determine the initial outcome for children and young people who committed low level offences, and diversion from formal proceedings by way of a police admonishment was an entrenched practice.

A degree of police discretion was inevitable when police cautions were issued, and the law initially took a permissive stance concerning police powers by tolerating elastic and vague rules (Bowley, 1975). There is no evidence of what criterion was initially necessary for a young person to receive an out of court disposal, and whether an admission was a necessary pre-requisite (McBarnet, 1978).

4.4 Increasing criminalisation of youthful behaviour

Despite the emergent recognition and use of the police caution as a diversionary disposal during the nineteenth century, which in part reflected increasing benevolence towards young people, there was simultaneously a significant escalation in the incarceration of young people and sentence tariffs, even for offences and misdemeanours which ostensibly could have been dealt with by way of a police caution (McConville, 1981; McConville, 1985; May, 2009:103). The 1836 Report of the Inspectors of Prisons argued that the Vagrancy Act 1824 and the Malicious Trespass Act 1827,

which both criminalised a range of behaviours peculiar to young people, resulted in some unfortunate outcomes:

> ‘Many offences for which a lad is now sent to gaol were formerly disregarded, or not considered of so serious a character as to demand imprisonment. By the Vagrant Act alone, hundreds who formerly were permitted to remain at large, are committed not for the commission of a specific offence, but as “idle and disorderly” or “reputed thieves”. The Malicious Trespass Act and other laws peculiarly applying to the offences of youth, have also materially contributed to the increase of juvenile prisoners….Delinquencies of the most trifling description, committed by mere children, and formerly thought very lightly of, are now treated as grave offences; and the youth who would a few years back on detection have been summarily chastised, is sent to gaol and arraigned before a criminal tribunal’ (UK Parliament, 1837:7, as cited in Magarey, 1978:18).

A range of other statutory provisions including the Larceny Act 1827 and Metropolitan Police Act 1839 further criminalised behaviour which previously would most likely have resulted either no action, informal admonishment or a police caution (Jones, 1992). These statutes extended categories of trivial behaviour and offending suitable for police intervention, including the flying of a kite, playing any game to the annoyance of inhabitations or passengers, or making a slide in the snow (Smyth, 2011:154). In addition to criminalising previously tolerated behaviour, a further consequence was to extend seemingly trivial behaviour within the jurisdiction of not only the police, but

also the magistracy. The punitiveness of the magistracy, in contrast to the judiciary, further contributed to the notable increase in the both the conviction rate of juveniles and the severity of sentences imposed on them (Magarey, 1978; Lee, 1961; Milton, 1967).

For very young people who offended, the increase in their incarceration during this period was also a consequence of a 'lapse' in application by the judiciary and magistracy of the presumption of *doli incapax* for offenders under fourteen years (Magarey, 1978), and they were often presumed to have the same capacity for understanding right or wrong and form intent as older youths and adults. Additionally, there was often indistinguishable use of punishment and poor relief, with offences such as begging and theft, committed by the young and destitute, increasingly dealt with by way of a criminal sanction (Carpenter, 1853).

During this period a constable was also responsible for prosecuting his own case in court and personally liable for any costs awarded to a defendant on acquittal, and was thus perhaps incentivised to target misdemeanours or misbehaviour by children and young people, given they were much less likely than an adult to present an able defence or instigate counter charges at court (Magarey, 1978: 117).

4.5 The police caution and the 'juvenile delinquent'

Anxiety and disapproval concerning children and young people who have transgressed the law, irrespective of the gravity of otherwise of their perceived wrongdoing, are chronicled throughout modern English history

(Pearson, 1983; King, 1998). During the same period in the mid-nineteenth century when the police caution began to gain official recognition, the notion or concept of the 'adolescent' and 'juvenile delinquent' also emerged (Pearson, 1983; Newburn, 2002; Hendrick; 2009) as an identifiable class of children and young people who contravened or challenged prevailing laws and morals, and were feared as:

> 'a race "*sui generis*" from the rest of Society, not only in Thoughts, Habits and Manners, but even in Appearance; possessing moreover, a Language exclusively their own' (comments of 'one interviewer' cited in Magarey, 1978:11).

Juveniles and juvenile delinquency become a 'major focus of anxiety during the nineteenth century' (King, 1998:1; Cox and Shaw, 2002) and identifiable subcultures such as 'Scuttlers' and 'Ikes' of Manchester, 'Hottentots' of Liverpool, 'Peaky Blinders' of Birmingham and the 'Hooligans', 'Chelsea Boys', 'Girdle Gang', 'Plaid Cap Brigade', 'Velvet Cap Gang', 'Drury Lane Boys', and 'Waterloo Road Gang' of London embodied this newly recognised juvenile delinquent (May, 1973: 105; Pearson, 1983:83, Muncie, 1999:169).

Theories concerning the emergence of the 'adolescent' and 'juvenile delinquent' and the establishment of the youth justice system have been the subject of considerable critiques, some of which question the extent to which the innovation of juvenile delinquency was a wholly benevolent development (Platt, 1969).

Idealists advocate that the enlightened concept of juvenile justice arose naturally and organically as life cycles and transitions between them during the nineteenth century became more distinct, facilitated during this period by the expansion of formal education, urbanisation, changes in family structure and an emerging interest in child welfare (Newburn, 2002; Randall, 2011). Revisionists however, notably Foucault (1995) and Platt (1969) argue that the classification of the juvenile delinquent around this period was the misguided and unintended consequence of social welfare reformers who:

> 'helped to create special judicial and correctional institutions for the labelling, processing and management of "troublesome youth" …the child savers…brought attention to, and in doing so, invented new categories of youthful behaviour which had hitherto been unappreciated' (Platt, 1969:3).

Others similarly argue the 'labelling' of children and young people as juvenile delinquents during the nineteenth century emerged not from any escalation in offending or demonstrable facts concerning the deviance of any act committed by a child or young person, but as a consequence of the established order constructing deviant behaviour by making rules in the service of their own interests and safeguarding their status and prestige during a period of considerable social upheaval (Foucault, 1995; Becker, 1963).

Socialist theorists argue the classification of juvenile delinquency, which gave rise to the concept of 'penal welfarism', came primarily from activism

between an alliance of feminists, labour movement campaigners and children and penal welfare groups (Logan, 2009). May suggests though that this classification was almost inevitable, through the fusion of the exertions of self-styled ‘moral statisticians’ who initiated the science of criminology and drew attention to the young age of many offenders, together with the swelling prison population which collectively stimulated efforts at reform, and in the process revealed the problem of the juvenile delinquent (May, 1973: 100-104). Shore however suggests contrarily that the conventional criminological and historical chronology of the ‘juvenile delinquent’ should be challenged, and the nineteenth century does not necessarily represent the watershed in youth justice it is often ascribed (Shore, 2002).

Though there is an absence of consensus concerning the provenance of the ‘juvenile delinquent’ during the nineteenth century, this period was undoubtedly the naissance of when childhood and adolescence become:

> ‘the most intensively governed sector of personal existence’ (Rose, 1990:121).

The increasing recognition of the police caution as an accepted practice for young people who offended - albeit initially exercised informally and ordinarily without sanction or consequence - was arguably impelled by the conflicting activism of benevolence and interventionist zeal.

4.6 The emergence of the police caution and the origins of 'net-widening'

The influence of 'child-savers' and welfarists on traditional practices and procedures concerning young people who offended, or were considered at risk of offending, was significant. These movements, which arose consecutively in England and other jurisdictions during the nineteenth century, were especially concerned with 'pre-delinquent offenders – the children who occupy the debatable ground between criminality and innocence' (Platt, 1974:188), and advocated early state intervention in the lives of these children.

Consequently, previous youthful behaviour which was either routinely ignored or dealt with informally became increasingly the subject of formal intervention. The inflationary consequences of the recognition and formalisation of the police caution as a diversionary measure for young people who offended diminished the practice where:

> 'it was sufficient for inconsequential behaviours to be stored only as mental notes or rough jottings in the notebooks of kindly constables' (Pratt, 1986: 212),

and criminalised childhood and adolescent behaviour previously not considered suitable for any action or punishment.

Though the police caution is conventionally considered a benevolent diversionary measure for children and young people who offended, in practice its emergence during the nineteenth century and acceptance

thereafter in the twentieth century resulted in significant numbers of young people entering the criminal justice system for minor or inconsequential offences.

The ‘net widening’ effect of diversionary measures is a recurrent theme in the study of youth justice policy and practice, and has been the subject of considerable comment (Ditchfield, 1976; Farrington and Bennett, 1981; Parliamentary All-Party Penal Affairs Group, 1981; Austin, et al, 1981; Cohen, 1985; McMahon, 1990; Goldson, 2000; Bateman, 2002).

4.7 Nineteenth century acceptance of the police caution

Despite the emergence during the nineteenth century of the ‘juvenile delinquent’ and an increase in the incarceration of young people, often for low level offences, by 1853 there was also broad acceptance that a police caution could be an appropriate disposal for a young person who committed a minor, trivial or technical offence, and was a pragmatic response where the likely sanction would be nominal (Steer, 1970; Davis, 1984). The police caution was generally perceived as introducing humanity into an often rigid and unfair system; affording discretion where legislation had become obsolete and rigorous enforcement was undesirable, and was a suitable disposal where a prosecution would be oppressive in the circumstances (Dingwall and Harding, 1998).

Despite the increasing use and recognition of the police caution, it did not receive unequivocal support, with concerns this ostensibly lenient disposal was detrimental to a young person’s character, and:

> ‘There is no indulgence more fatal to a boy than a series of light punishments; this familiarised his mind to degradation and left him in a path which would lead him step by step to the gravest crimes and consequently to the heaviest inflictions known to the law’ (Davenport Hill, 1857, quoted in Duckworth, 2002:39).

The first known record of a police caution issued to an adult was in 1833, four years after the establishment of the Metropolitan Police force, though it was not until 1853 that any official police policy formally encouraged informal warnings to be issued by way of police caution for minor offences (Smyth, 2011). The first documented issuing of a police caution for young people who committed an offence deemed suitable for a caution (if indeed an offence and not merely nuisance behaviour which fell outside of statute or common law) was in 1858 and concerned the seemingly trivial misdemeanour of:

> ‘Complaint having been made of boys running alongside omnibuses in the streets turning somersaults, which is encouraged by passengers throwing halfpence; boys who are guilty of this practice are to be cautioned that, if it be repeated, the law must be enforced against them’ (Steer 1970:55).

The ambit of the ages of the boys referred to is unknown, and the definition of ‘boys’ in 1858 would not necessarily be commensurate with modern statutory definitions of ‘young offenders’ (Magarey, 1978; May, 1973:98). Given however that the criminal age of responsibility in England and Wales

at that time was 7 years of age, the lowest in Europe, it is likely the boys referred to would fall above the then age of criminal responsibility. It is not apparent from this account however whether this caution was an informal or formal recordable disposal.

By the end of the nineteenth century there was increasingly broader support for less punitive measures for young people who offended, and greater use of discretionary and diversionary police measures, with a prevailing belief that young people who offend:

> ‘are not the product of any deep-seated criminal propensities: they represent a transitory phase of mental and moral development, and the desire to commit them quite disappears when maturity is attained. If a child is under healthy and normal home surroundings it is usually wiser in such circumstances to refrain from convicting and to regard the ends of justice satisfied by resorting to admonition alone’ (Morrison, 1896:189).

The absence of reliable records from this period however hinders identifying or distinguishing the practice of a formal police caution - where a record was retained and which could potentially prohibit the issuing of a further similar disposal, and the practice of an informal police caution - a non-recordable admonishment or punishment (Emsley, 1983). There is also no record of what pre-requisites were necessary for an informal or formal caution to be issued, such as the existence of sufficient evidence for a realistic prospect of conviction, an admission, remorse, consent to the issuing of a caution, or

co-operation with the police. The absence of published or reliable crime statistics until 1876 (Gatrell, et al, 1980; Emsley, 1983: Maguire, 1994) and the lack of official cautioning statistics until 1954 (Ball, 2004) further impedes analysis of the frequency and geography of early police cautioning of children and young people who offended or were subjected to police sanctions primarily on welfare grounds.

4.8 Conflicting ideologies of the Juvenile Court and police discretionary powers.

Despite the increasing approval of less punitive measures for young people who offended, by the early twentieth century there continued to be an absence of consensus regarding the suitability of the police caution for young people who offended (Dingwall and Harding, 1998). The establishment of the Juvenile Court under The Children Act 1908 reflected, in part, increasing concern that police cautioning for all but the most trivial of offences was outside of the proper remit of police powers, and was an ineffective disposal when intervention was necessary to prevent recidivism (Home Office, 1927).

Increasing advocacy for the necessity of intervention on welfare grounds resulted in the:

> ‘language of delinquency shift[ing] to a more welfare orientated vocabulary, with notions of the “neglected child” in “need of care and protection” gaining favour’ (Cox and Shore, 2002:10).

The establishment of the Juvenile Court was thus considered to be either a consequence of a larger shift towards ‘penal welfarism’ within the criminal justice system (Garland, 1985); the result of ‘liberal progressives’ initiatives to establish new strategies to deal with children and young people who offended (Bailey, 1987); or the natural result of other intellectual and ideological currents of the era, notably socialism and feminism (Logan, 2009).

The Juvenile Court actively encouraged the police to prosecute children and young people, presupposing that the court was best placed to fulfil the dual roles of dispensing both justice and welfare, as opposed to the issuing of a formal or informal caution by the police. This doctrinal pursuit of an interventionist welfarist agenda also encouraged the prosecution of children and young people considered ‘in need of care and protection’, with the court and the powers available to it regarded as more suitably equipped than the police to help children and young people whose offending was perceived as inextricably linked to wider welfare considerations.

There was considerable support for further expansion of the Juvenile Court’s jurisdiction so that it had:

> ‘control over all children and young persons under 18 who have fallen or were likely to fall into delinquency’ (Hall, 1926:266-267),

and should have powers greater than those of the police, with the authority to bring children:

> ‘before the Court without being formally charged at the police station’ (Hall, 1926:266-267).

The practice of routinely diverting children and young people from the Juvenile Court by way of a police caution was also strongly condemned by the first review undertaken of Juvenile Court. The Molony Committee concluded that:

> ‘This practice seems to us objectionable, as usurping the functions of a tribunal, and we think it is outside the proper duties of the police…when it is realized that these courts are specially equipped to help rather than punish the young offender we hope that the reluctance to bring such children before them will disappear’ (Home Office, 1927:22-23).

The Committee did recommend that the police could turn a ‘blind eye’ to young first time offenders, but only when dealing with minor offences and ‘if applied with judgement and good sense’ (Home Office, 1927:22). Tensions at that time between the conflicting ideals of benevolence and punishment in the newly developing sphere of youth justice were evident, as despite recognising that not all minor offences needed to be formally dealt with, the Committee also approved the corporal punishment of boys, pronouncing that:

> ‘We believe that there are cases in which whipping is the most salutary method of dealing with the offender, but as much depends

> on the character and home circumstance of the boy concerned' (Home Office, 1927:69)

In addition to the establishment of the Juvenile Court in England and Wales in 1908, the introduction of the Children and Young Persons Act 1933 further converged punishment and welfare of young people under the auspices of the Juvenile Court, and was intended to discourage regional police forces from developing any specific youth justice diversionary regimes. The resultant disapprobation of out of court disposals by way of police cautions inevitably resulted in an escalation in the numbers of young people who committed low level offences entering the formal criminal justice system and accruing an antecedent record. The 'net-widening' effect of this 'welfarism' arguably had the effect of 'drawing into the criminal justice system both the deprived and the depraved child' (Padfield, 2003:30; Pratt, 1986; Gelsthorpe and Padfield, 2003).

Despite ostensibly supporting the ideological dictum that a prosecution was usually preferable to a police caution for children and young people who offended, and legislating to restrict its use, the Home Office conversely encouraged initiatives which facilitated diversion and endorsed the establishment of juvenile liaison schemes (Home Office, 1951). The majority of police forces throughout England and Wales also still continued to establish their own diversionary schemes, though with notable variances of use.

Remarkably, given the conflict between the Molony Committee's disapproval of the use of the police caution for children and young people, and its increasing recognition and use, it was the subject of very little official interest. It was, for instance, given no consideration in the Report of the Royal Commission on Police Powers and Procedure 1929 (Steer, 1970:55).

4.9 The emergence of the 'formal' police caution in the twentieth century

Despite the emergence of the Juvenile Court, the practice of an informal police caution continued to be operated by the majority of regional police forces, and became increasingly formalised. This however resulted in the diminution of informal measures. The formal police caution, unlike an informal caution, was usually issued not at street level or immediately after an offence, but at a later date at a police station, by a more senior officer, and a young person's parent or guardian was expected to be present. Significantly, a record was retained of the caution which formed part of a recorded antecedent history, which may at a later stage preclude another out of court disposal and was also citable in any subsequent judicial hearing.

The first recorded practice of formal cautioning in Great Britain for young people was in 1905, when Glasgow City Police established, without statutory authority, a 'Superintendent's Court', and:

> 'Juvenile offenders' attended with their parents together with a representative of a relevant welfare service, a formal caution was

> issued by a senior officer, and a record was retained of this disposal (Steer, 1970:55; Dingwall and Harding, 1998:104).

Significantly, although there was no official prohibition on the number of cautions which could be issued, the issuing of a formal caution could result in escalation into the formal criminal justice system if another offence was committed, even if of a minor nature and, in isolation, itself suitable for a caution. The implementation of the Children Act 1908 however temporarily curtailed this practice (Ferguson, 1952), with the Report of the Scottish Department Committee on the Treatment of Young Offenders reporting that:

> 'Where minor offences were disposed of by caution before the passing of the Children Act 1908, the practice appears to have been abandoned owing to the fact that there was no statutory authority for it, owing to the provision of children's courts under the Act (Steer, 1970:18).

Regional police forces in England and Wales continued to develop cautioning schemes, but with divergent attitudes and policies concerning whether it was a legitimate or effective role of the police to both caution young people who offended and also seek to address the causes of offending. Whilst Merseyside Police formally established its own highly interventionist diversionary scheme in 1949, which was a:

> 'a natural development of the preventative work that the police and particularly the "village policeman", had been carrying out for many

> years with wholehearted approval' (Home Office, 1960:50; Somerville, 1969:475),

the Metropolitan Police were ideologically opposed to this practice, with the Metropolitan Commissioner's informing The Ingleby Committee that:

> 'Since 1933 the practice of cautioning juvenile offenders was probably less in his force…he and his predecessors had taken the view that the intention of Parliament, as expressed in the Children and Young Persons Act of that year, was to provide in the juvenile court system a means of dealing with young offenders in the interests of their own welfare and in a way that would prevent them from taking to a life of crime. The police would be open to serious criticism if they took it upon themselves to withdraw some children from the operation of this system to be dealt with in a different way (Home Office, 1961:51).

Nevertheless, despite the continued 'disquiet' amongst some police forces and interested groups, especially the magistracy (Steer, 1970:18) who maintained this was 'contrary to English justice' (Lee, 1998:23), most regional police forces, particularly in the north of England, continued to establish their own diversionary schemes for young people who offended, and endeavoured to use this measure to target identifiable risk factors likely result in further offending. The increasing conjoining of cautioning practices with targeted early interventions further formalised the process of the police caution for young people.

Additionally, the continuing formalisation of the police caution in the absence of any statutory or common law endorsement again reflected the practical and ideological conflict between the police and judiciary concerning which agency was best placed to not only reprimand or punish, but prevent the commission of offending. The Chief Constable of Liverpool City Police, who had formalised its cautioning and diversionary practices into the Merseyside Juvenile Liaison Scheme in 1949, argued that given the limitation of the Juvenile Court, primarily that it was only engaged after offending had taken place that police should have primary jurisdiction as:

> 'It is very evident that the real solution (to the problem of juvenile delinquency) must be found not so much in improved methods of dealing with offenders after conviction, as in the field of prevention of the development of offenders' (Steer, 1970:18).

Somewhat unusual experimental research projects were also undertaken by the police to assist in identifying apposite models of diversion. One such project determined which cohort of young people would receive either a simple police caution or a caution together with a package of supervision, by randomly:

> 'providing the Chief Inspector in charge with a series of sealed envelopes in which contained an instruction for caution or supervision, prepared by throwing a dice, had been placed' (Rose and Hamilton, 1970:2).

Other diversionary schemes sought to identify both the cause of juvenile crime and whether a police caution was a suitable disposal through the psychological study of each young person, and distinguish those with ‘sub-normal intelligence’, those with ‘sub-normal emotions’, and those who were ‘sub-normal in morality and character’ (Burt, 1944).

4.10 First statistical analysis of the police caution

The publication of the first statistics on the use of the police caution in 1954 revealed that despite the reluctance of some police regions to establish diversionary liaison schemes, and the magistracy seeking to retain jurisdiction even for low level offences, the proportion of ‘juvenile offenders’ being issued with a caution throughout the twentieth century consistently increased (Steer, 1970). This was despite the age of criminal responsibility being raised from eight to 10 years (Children and Young Persons Act 1963) and no discernible commensurate rise in youth offending. Significant geographical disparities in the cautioning of both adults and young people were evident however (McClintock and Avison, 1968), and this emerges as a recurrent theme in diversionary practices in England and Wales - and is discussed further in this thesis at paragraphs 4.14 and 4.18.

Steer, in his 1970 study of police cautions, concluded that the increasing use of the police caution was in part the consequence of the expansion of juvenile liaison schemes leading to cautions being issued more frequently in certain regions, but was also simply a reflection of improvements in the recording of cautions issued. Steer further found that the rise in the number

of cautions issued to young people was also a consequence of the fact that the majority of complainants did not want young people prosecuted, and these schemes gave complainants greater confidence to report minor offences committed by young people to the police, in the belief that a formal prosecution would not be initiated.

Though Steer's conclusions reflected the prevailing understanding of cautioning at that time (Nelken,1976) it is arguably flawed. Another rationale is that formal cautioning schemes incentivised the reporting of low level offences which ordinarily were unlikely to have been reported to the police, as these schemes were more likely to result in some intervention and sanction. Informal police cautioning usually involved either no action or minimal intervention, and as such complainants may have felt reporting a low level offence was not worth the effort in the absence of a formal cautioning scheme.

4.11 The police caution and 'welfarism'

The Ingleby Committee, tasked in 1956 with a review of the youth justice system, rejected the notion that the judiciary was the most suitable body to prevent further offending, and approved the practice of the police caution, finding that:

> 'It is generally accepted that the police are not obliged to prosecute every offender against the law who comes to their notice even when they have a clear case: they may properly exercise discretion in deciding whether to bring proceedings or merely to administer a

> caution…it seems unnecessary and undesirable to bring a child before a court if the shock of being found out and the effect of a caution from the police are enough to make it unlikely he will offend again' (Home Office, 1960:49).

The Committee also found that:

> 'Since a conviction may have serious consequences for a young person's career, there is a natural reluctance to prosecute…A caution spares offenders the stigma of a court appearance, and may preserve whatever deterrent effect is presented by the threat of prosecution. A caution may be given in the hope that if a juvenile is not immediately treated as a delinquent then there is less chance of his behaving like one in the future' (Home Office, 1960:147).

The court was however considered a suitable venue where the child was:

> 'one whose delinquency results from more deep-rooted causes…often the right form of treatment can be provided only by a decision of the court' (Home Office, 1960:49).

Thereafter the Home Office increasingly approved the police caution as an appropriate disposal for young people who committed low level offences (Home Office, 1965; Home Office, 1968) and by 1969 the majority of regional police forces had embraced the formal police caution as a legitimate diversionary practice within their exclusive jurisdiction, and introduced some form of diversionary scheme for young people who

offended; though their scope and function varied considerably (McClintock and Avison, 1968).

The north of England continued to develop more progressive models, where a police caution was ordinarily coupled with supervision or some form of intervention. In London the Metropolitan Police initiated in some boroughs, though not all, a Juvenile Bureaux, and in West Ham established a Modified Juvenile Liaison Scheme, with both schemes containing specially trained officers who decided in consultation with other professionals whether a young person should be cautioned or charged (Osborough, 1965; Steer, 1970.) The Modified Juvenile Liaison Scheme accepted referrals not only from the police as a direct consequence of offending, but also referrals from 'parents, schools, shops and various welfare agencies' when 'delinquent behaviour was of concern' with the latter accounting for two-thirds of their caseload (Taylor, 1971:7).

The determining factor for suitability for the majority of liaison schemes was the level of seriousness of the offence committed, with a constable ordinarily distinguishing youthful misbehaviour so trivial as to require no action or intervention at all, misconduct requiring an informal warning, or more serious behaviour (significantly not necessarily criminal) which would result in a formal report to the bureaux with a recommendation as to the appropriate disposal (Oliver, 1973; Ritchie and Mack, 1974).

4.12 The police caution and 1960s radicalism

By the mid-1960s youth justice had become increasingly radicalised, with some theorists rejecting a retributive and disciplinary response to youth offending, and advocating a child-centred, welfarist approach, with either radical non-intervention, or the greater use of informal and non-recordable measures (Becker; 1963; Lemert, 1967; Schur, 1973; Bottoms, 1974; Morris and Giller, 1987; Garland, 1985; Ball, 2004; Pitts, 1988; Gelsthorpe and Morris, 1994; Dingwall and Davenport, 1995).

Welfarist ideologies had been partially reflected in the White Paper 'The Child, the Family and the Young Offender' (Home Office, 1965), which set out provisional proposals to divide youth justice into separate jurisdictions for those aged under 16 years and those aged under 21 years, and for the latter cohort, to transfer the majority of the Juvenile Court's powers to local authorities by way of children's committees, family councils and a newly created magistrates court sitting as a Family Court. The White Paper made no reference at all to the role or otherwise of the police caution for either cohort, and sought to diminish the jurisdiction of both the police and judiciary concerning young people who offended, and to spare them 'the stigma of criminality' (Home Office, 1965:5) as:

> 'In the great majority of cases of offenders brought before the juvenile courts, the facts are not in dispute. The problem is to decide the appropriate treatment, and the court procedures, designed essentially for testing evidence, do not provide the best means for

> directing social enquiries and discussing possibilities with the child's parents and the social services that might be concerned with the treatment' (Home Office, 1965:5).

Although the:

> 'objectives and broad strategy of these proposals were warmly welcomed…as far as possible' (Home Office,1968:3-5)

the 1965 White Paper did not result in any significant legislative or procedural changes. The subsequent White Paper 'Children in Trouble' (Home Office, 1968) was similarly radical, and though it retained the jurisdiction of the juvenile courts, advocated a double-barrelled test that:

> 'The prosecution of children [aged 10-14 years] will cease, and action to deal with offenders and to help their parents has been taken, where possible, on a voluntary basis. If a child commits an offence *and* his parents are not providing adequate care, protection or guidance, *or* the offence indicates that he is beyond parental control, it will be possible to take him before a juvenile court as in need of care, protection or control' (Home Office, 1968:17).

The White Paper further proposed that those aged 14 to 17 years should only be made subject to criminal proceedings after mandatory consultations between police and social service departments, and a multi-agency decision that prosecution was a last resort. It made no reference at all to police cautioning practices. The resultant legislative initiative, the Children and

Young Person Act 1969, sought to establish a youth justice system that wherever possible kept young people outside of formal processes, and was:

> ‘aimed at developing the child’s treatment according to his response and changing needs’ (Tutt and Giller, 1983:587).

The Act did however approve the use of the police caution, and gave for the first time statutory recognition to the practice of the police caution (Bottoms, 1974). Between the passage of the Act however and its commencement, a newly elected Conservative government abandoned the majority of the more radical proposals, in preference to an alternate ‘justice’ approach. The utility of formal prosecutions and the role of the judiciary were subsequently endorsed, diversionary practices were restrained to a model of proportionate intervention, and the police caution remained a non-statutory but approved practice (Bottoms, 1974).

The subsequent Home Office guidance still encouraged the police to engage with other relevant agencies during the decision making process and permitted the diversion of young people who offended from the formal justice system, but only when deemed proportionate and appropriate, as:

> ‘It is the well-established practice of police forces to caution a considerable number of juvenile offenders. The Act [Children and Young Persons Act 1969] does nothing to inhibit the continuance of this practice: on the contrary, it leaves full scope for the use of the caution as one of the variety of available courses of action, other than

> court proceedings, to be used appropriate' (Home Office, 1970:10; see also Ditchfield, 1976; Gelsthorpe and Morris, 1994).

4.13 The 1960s and increasing recognition of the police caution and police autonomy over children and young people

By the mid-1960s the majority of police regions had embraced the police caution as an inherent and legitimate police function. The development of formal diversionary schemes by most police regions was arguably however, at least in part, not a reflection of benevolence or enthusiasm for a diversionary welfarist agenda, but rather a pre-emptive measure to retain their considerable autonomy over this cohort.

There is also some evidence that the police also embraced cautioning:

> 'partly because of dislike of the delays of the juvenile courts which replaced the earlier cuff-on-the-ear methods… [and] it is probably thought by some officers that the attitude of the juvenile courts is too "soft"' (Osborough, 1965:424).

Others though suggest that police autonomy concerning outcomes for young people who offend derived from the fact that the young "street" population has always been the prime focus of police order-maintenance and law enforcement work and due to the inherent disadvantages young people experience they are considered no less than 'police property' (Lee, 1981; Loader, 1996; Reiner, 2000; McAra and McVie, 2005).

Support for this theory is perhaps borne out by the Commissioner of the Metropolitan Police who declared that:

> ‘In some parts of West London, which attract the weekend “beat and drug” set, juveniles sweeps are carried out by the police, in the course of which youngsters under the age of 17 who are clearly away from home all night are taken to the police station and their parents sent for. The purpose is to bring the facts to the notice of parents and inform them of the moral danger to which the juveniles are exposed. The vast majority of parents are grateful this action is taken’ (Simpson, 1968:124).

Commissioner Simpson also argued that although there were inherent benefits in the multi-agency approach of Juvenile Liaison Schemes, the police should have a greater decision making remit within these schemes, despite the perception that:

> ‘the police officer, even though it be a woman who devotes the majority of her time to this sort of case, has been looked upon as a person untrained and ignorant of the ways in which the evils of criminal contamination may be dealt with’ (Simpson, 1968:127).

Nevertheless, despite the tensions between the magistracy, the police, and policy makers concerning jurisdiction over young people who offended, the judiciary consistently recognised the principle of constabulary independence, and that the initiation of any criminal proceedings was exclusively the remit of the police. As Lord Denning forcefully stated in *R v*

Commission of Police of the Metropolis, ex p. Blackburn [1968] 2 W.L.R. 893 at 902:

> 'I hold it to be the duty of…every Chief Constable to enforce the law of the land…. he must decide whether or not suspected persons are to be prosecuted; and if need be, bring the prosecution or see that it brought. But in all these things he is not the servant of anyone, save the law itself. No Minister of the Crown can tell him that he must or must not…. prosecute this man or that one. Nor can any police authority tell him so. The responsibility of law enforcement lies on him. He is answerable to the law and to the law alone.'

Police autonomy within criminal justice processes concerning outcomes for young people is a central theme in any discourse concerning diversion of young people who offend from a formal prosecution. Newburn argues that whilst the police continue to occupy the key position as 'gate-keepers' and 'agenda setters' regulating the flow of young people into the criminal justice system, any efforts at reform will always be incomplete (Newburn, 2011:96).

4.14 Continuing criticisms of the police caution

Despite increasing advocacy from the 1960s until the early 1990s for alternative diversionary processes to the police caution, which variously promoted either a welfarist, minimal or radial non-intervention model (Bottoms, et al, 1970; Bottoms, 1974; Morris and Giller, 1987; Pitts, 1988; Pratt, 1989; Evans, 1994), the police caution as a diversionary disposal continued to lack unequivocal support.

The Ingleby Committee, which had endorsed the use of the police cautions for young people who commit low level offences and declared them a 'courageous departure from [an] orthodox outlook' were still nevertheless concerned that they were not as successful as other interventions available under a sentence imposed by the court as:

> 'Young offenders were often of extremely low intelligence or maladjusted: police officers, however good their intentions, lacked the special training necessary to help those who suffered from such handicaps. Trivial offences were often only a symptom of an underlying condition, requiring early and specialised treatment, that was revealed only by the full enquiries made when the child came before a court' (Home Office, 1960:51).

The magistracy again continued to resist increasing cross-party political support for the non-judicial police caution, arguing it usurped their function at the expense of the executive (Dingwall and Harding, 1998; Bottoms, et al, 1970). There were also concerns that cautions were being issued in the absence of sufficient evidence that an offence had been committed, issued without adequate consultation with victims, and young people were on occasion issued with cautions not for the commission of any offence, but as a preventative measure concerning 'future misconduct' (Steer, 1970:35; Nelken, 1976).

A further criticism concerned the causal effect of cautions on subsequent stages of the criminal justice process, with the 'predictable result' of

‘consequential adjustments’ (Nelken, 1976) by the juvenile court, which made less use of nominal penalties such as discharges and fines, having assumed the police had sifted cases suitable for that disposal through cautioning, and only initiated prosecutions for more serious offences or offenders (Steer, 1970). Home Office Guidance (Home Office, 1978) authorising the citing of previous cautions issued to a young person in any subsequent Juvenile Court proceedings further compounded the reluctance of the Magistrates to impose nominal sentences for low level offences, as recidivism was considered sufficient cause for imposition of a sentence in excess of the gravity of the offence, and where ordinarily if considered in isolation a discharge or nominal penalty would have been imposed (Tutt and Giller,1983’ Henman, 1990).

In addition to the ‘inflationary’ consequences of citing police cautions in Juvenile Court proceedings (Ditchfield, 1976:8), the expansion of youth cautioning schemes resulted in a significant increase in the number of young people issued with a formal and recordable caution (Gibson and Cavadino, 1995; Gelsthorpe and Morris, 1999) despite no commensurate rise in offending or corresponding reduction in prosecutions. This ‘net-widening’ was not only reflected in the increase in the number of young people accruing antecedents and escalation in sentence tariff, but was also the subject of further criticism for widening police discretionary powers and ‘the net of social control over young people’ (Goldson, 2000:45). Advocates of labelling theory also continued to argue that despite the diversionary objectives of police cautions, formal police cautions escalated delinquent

identities and behaviours a consequence of this negative or adverse engagement with the police (Gold and Williams, 1969; Klein, 1974; Farrington, 1977).

Criticisms of the statistical collation and analysis of cautioning were common, with data considered unreliable and 'notoriously difficult to interpret' (Tutt and Giller, 1983), especially as a consequence of police misclassification of cautions and informal warnings, with these two terms often used interchangeably (Somerville, 1969; Steer, 1970; Dingwall and Harding, 1998). The influential Ingleby Report made no distinction whatsoever between these two practices and seemingly did not appreciate the differences.

There were other concerns that the discretion afforded to police officers as adjudicators was not only disproportionate to the powers afforded to them (Laycock and Tarling, 1985), but also engendered discriminatory practices, as 'extra-legal' factors such as race, gender, social class, demeanour, educational attainment and perceived levels of parental control were improperly influencing decisions in favour or against the issuing of a police caution (Bennett, 1979; Fisher and Mawby, 1982; Landau and Nathan, 1983; Gelsthorpe, 1989; Sanders and Young, 2002).

The absence of any established or considered criterion for the issuing of a police caution was of concern to some, and despite the considerable jurisdiction the police held concerning outcomes for young people who offended, there are few records of what, if any, training was provided to

police concerning how to determine whether a caution was a suitable disposal, and just as significantly, how to administer it. The apparent difficulty in implementing such training was noted by one commentator as:

> 'the question of how and when to apply discretion is left to the approach of the individual officer. It is not regarded within the police service as a subject which can readily be taught or imparted in training' (Somerville, 1969:408).

The various Home Office guidelines concerning police cautioning (Home Office, 1970; 1980; 1985) were also criticised as being excessively broad and absent of practical detail, advising the police:

> 'what to do but not how to do it' (Evans and Wilkinson, 1990:174),

though the introduction of national standards in cautioning practices sought to address this (Home Office, 1990), though unsuccessfully (Bateman, 2002).

A persistent criticism of police youth cautioning was the geographical disparity of use between regional police forces, and sometimes within a singular force as well; with considerably greater use of cautioning in the north of England than other regions, and a significant disparity between low rates of cautioning in cities and higher cautioning rates in rural areas (Royal Commission on the Police, 1962; Patchett and McClean, 1965; McLintock and Avison, 1968; Steer, 1970; Ditchfield, 1976; Tutt and Giller, 1983; Laycock and Tarling, 1985; Giller and Tutt, 1987; Pitts, 1990; Evans, 1993a; Ball, 2004). In 1966 for example, 6 city regions cautioned less than 10% of

boys under the age of 14, in comparison to almost 70% of boys in 25 rural and semi-suburban areas (Steer, 1970:14).

Steer concluded that reasons for this disparity were uncomplicated and explained by the fact that the police in rural and smaller urban areas were more 'able to keep an eye on potential delinquents' (Steer, 1970:17). Ditchfield however gave greater weight to the influence of varying regional crime patterns, and concluded that:

> 'in the cities there is readier access to courts; there is also a higher rate of offending and a feeling on the part of the police that, because of the greater impersonality of the urban situation, the courts are in a better position to assess the needs of offenders than are the police.' (Ditchfield, 1976:25).

Somerville suggested that informal measures were practiced more frequently in rural districts as a consequence of:

> 'the "village bobby", who knows most of the inhabitants personally and is therefore often able to deal with and contain minor infringements of the law by a timely word of warning' (Somerville, 1969:409).

Tutt and Giller (1983) argued that reasons for this disparity were more complex and included police cautioning for young people lacked any coherent theoretical basis, which was especially reflected in the considerable variation in attitude towards youth cautioning by Chief Constables who dictated their local youth justice practices. They also

concluded that Chief Constables favoured either a ‘welfare’ approach, which focused primarily on the circumstances and needs of the young person, or a ‘justice’ approach, where decision making was centred on the nature and seriousness of the offence committed by the young person.

Osborough however argued that although there was no sinister explanation for the considerable regional variations in the cautioning of young people, the discretion this practice afforded to individual police officers was so great that inevitably:

> ‘there is bound to be an element of caprice about the manner in which that power is exercised’ and ‘an acceptable uniformity of practice is merely a pipe dream’ (Osborough, 1965:424-425).

In addition to geographical disparities of use, the police caution was also found to be issued disproportionately between genders and racial groups, with more boys than girls and more black youths than their white counterparts issued with formal cautions (Steer, 1970; Landau and Nathan, 1993; Goldson and Chigwada-Bailey, 1999; Home Office, 1999a; Worrall, 1999). The absence of an independent prosecuting authority at that time also resulted in recommendations by the Magistrates Association, Law Society for England and Wales and other interested parties that:

> ‘the police in England and Wales should have more legal advice in deciding upon prosecution or issuing summonses than is the present practice in some areas’ (Royal Commission on the Police, 1962:113).

Despite these criticisms, until the profound change in political mood in the 1990s (Gelsthorpe and Padfield, 2003) - discussed further in this thesis at paragraphs 4.20 and 5.3 – there continued to be broad support for the practice of diverting children and young people from the court by way of a police caution for low level offending where no entrenched pattern of offending was identifiable or likely. The diversion of young people who offend from formal processes correspondingly became enshrined in international law, and subsequently entwined with human rights principles - discussed further at Chapter Five).

Proponents argued it was good for police relations and presented them in a 'new light' in the role of assisting parents to keep their children out of trouble and avoiding a court appearance; improved recidivism rates amongst young people (Mack, 1975); was a flexible and enlightened model of police practice (Wortley, 2003); reduced congestion in the Juvenile Court (Osborough,1965); and though had imperfections and further safeguards were necessary, police discretion was usually used wisely, and it was a humane and pragmatic process for young people and other vulnerable groups where there were strong public interests grounds not to initiate a formal prosecution (Steer, 1970).

Up until the early 1990s the Home Office also continued to promote cautioning, and endorsed the prevailing view that there was:

> 'widespread agreement that the courts should only be used as a last resort, particularly for juveniles and young adults; and diversion from

> courts by means of cautioning or other forms of action may reduce the likelihood of re-offending. These factors would support a policy within which cautioning is used for a wide range of offences and offenders' (Home Office, 1990: paragraph 7).

4.15 Continuing demise of informal police action

Historically 'there is ample evidence that much delinquency was subject to informal admonition' (Dingwall and Harding, 1998:26) and for reasons including cost, proportionality and effectiveness, informal measures were often implicitly utilised not as an intentionally diversionary measure, but rather as the usual, expected and natural response to youth offending (Sharpe, 1980). Although the increasing formalisation of the police caution and diversionary schemes diminished the use of informal measures, until the early 1990s the practice of taking no action or informal procedures was an accepted course of action in certain circumstances (Home Office, 1978; Home Office, 1990, Muncie, 1999). Somerville's study of cautioning practices identified:

> 'Police cautioning of petty offenders as an alternative to prosecution operates at two levels. Primarily, there is the informal caution or warning issued verbally by a patrolling police-man as an alternative to invoking the full legal process…the second level of discretion…involves decision making on the part of senior-police officers in the matter of a prosecution. Where a decision is made not to prosecute, a formal caution is issued' (Somerville, 1969:409).

The dangers of undermining the use of informal action were acknowledged by the Home office Circular 14/1985 ‘The Cautioning of Offenders’ (Home Office, 1985), which although encouraging the use of informal measures, greater consistency in decision making and improved inter-agency liaison, also provided a ‘steer’ towards greater use of the police caution as the standard disposal for all young first time offenders for all but serious offences (Giller and Tutt, 1987; Goldson, 2000:35; Evans and Wilkinson, 1990; Evans and Wilkinson, 1990a; Muncie, 1999). The Circular also however recognised that increased cautioning risked increased net-widening, and:

> ‘…it should not follow that simply because a juvenile is brought to the police station formal action (*e.g.* a caution) is required, as against a decision to take less formal action at all. This is an area which supervisory officers will need to monitor carefully’ (Home Office, 1985).

Confusion between the practice of informal but recordable admonishments and formal youth cautioning also persisted, and was compounded by Home Office Circular 59/1990 ‘The Cautioning of Offenders’ (Home Office, 1990), which referred to informal police cautions as an ‘instant caution’ (paragraph 14) as opposed to a formal and recordable caution. Despite an earlier warning against these confused practices (Home Office, 1985) this misnomer inadvertently resulted in a sharp increase in the number of police cautions issued to young people who would ordinarily have been dealt with

informally, and engendered a cultural reluctance by the police to routinely deal with young people informally (see Goldson, 2000).

Though the Home Office acknowledged in its subsequent circular 18/1994 'The Cautioning of Offenders' (Home Office, 1994) that the earlier reference to an 'informal caution' in the 1990 Guidance was unhelpful and the expression 'informal caution' should not be used, this error arguably contributed significantly to the diminution of informal measures for young people who offended. Similarly, the Association of Chief Police Officers (ACPO) introduced in 1995 its own 'formal warning' procedure which was intended to be non-citable in any subsequent criminal proceeding, but a record was retained locally to assist future determination of case disposal in the event of re-offending (ACPO, 1995). This procedure operated alongside formal police cautions and further confused informal and formal cautions.

Though these types of informal measures were primarily a benevolent diversionary disposal, they were not without criticism. Concerns included that they were being issued in the absence of any safeguards and contrary to any suitable pre-conditions for suitability, and were being recorded on 'personal' records kept by the police which disproportionately influenced subsequent pre-court decision making (Evans and Wilkinson, 1990a). Similarly, advocates of 'radical non-intervention' disapproved of even informal measures, advocating that 'we should leave kids alone wherever possible' (Schur, 1973).

Other criticisms included the absence of supervision or regulation of the 'low visibility' processes involved with informal disposals (Evans and Puech, 2001:796) and that informal decision making tolerated discriminatory police practices, as:

> 'police discretion is not an equal opportunity phenomenon. Some groups are much more likely than others to be at the receiving end of the exercise of police powers. A general pattern of benign under-enforcement of the law disguises the often oppressive use of police powers against unpopular or uninfluential and hence powerless minorities' (Reiner, 1994:725-726).

Exponents of 'labelling theory' and 'judicious non-intervention' both similarly condemned even informal measures as an often disproportionate societal reaction to trivial deviant behaviour which was likely to result in a deviant self-perception and secondary deviancy (Lemert, 1967).

The 'return to justice' movement (see Morris, et al, 1980) further argued that welfare centred justice, which promoted certain informal interventions, were in practice insufficiently proportionate to the misdemeanour and/or issued inconsistently, and despite the benevolent intention of informal measures, children's rights were better safeguarded through a court hearing, legal representation and a statutory appeals process (Asquith, 1983). Arguments in support of the associated 'just deserts' principle, were similarly promoted to support police cautioning as a proportionate response to minor offences by persons of low culpability, such as children and young people.

4.16 The police caution and the 'bifurcation' of youth justice

Despite official recognition of the value of out of court disposals for young people who offended, the earlier radicalism of the 1960s failed to substantively transform youth justice practice and procedures, with increasing numbers of young people entering the criminal justice system, resulting in a 'hybrid' system of welfarism and justice ideologies (Randall, 2011:2). This 'bifurcation' of youth justice during the 1970s and 1980s saw a dichotomy between punitive and diversionary measures for young people who offended (Bottoms, 1977; Pitts, 1988) and cautioning arguably had no coherent theoretical basis (Tutt and Giller, 1983).

Despite the increase in use of the police caution there remained:

> 'no statutory basis for the formal caution. As is well known, the phrase "formal caution" in this context is used to describe a discretionary procedure adopted by the police which was developed with special reference to juvenile offenders but is now used quite extensively for adults' (*R v Commissioner of the Police of the Metropolis ex p Thomson* [1997] 1 WLR 1519 at 1520).

Moreover, the various Home Office Guidelines intended to promote and/or regulate youth cautioning practices (Home Office, 70/1978, 14/1985, 59/1990, 18/1994) were not binding on the police as:

> 'It is therefore the responsibility of each Chief Constable to set out his own policy, though for reasons of consistency, the Chief Constable

> will wish to take into account the views of the Home Office, particularly if, as in the case of Home Office Guidance on cautions, the guidance is clear and careful' (*R (on the application of Stratton) v Chief Constable of Thames Valley Police* [2013] EWHC 1561 at 41 (Admin)).

Pratt argues however that debate concerning diversionary justice and welfare models were no more than a 'sideshow' as a third model of youth justice emerged, namely 'corporatism', driven by managerial and actuarialist discourse within the youth justice system (Pratt, 1989). The fact that cautioning had yet to be put on a statutory footing made it especially susceptible to wide discrepancies not only between various police regions, but also within a single police region (Ditchfield, 1976; Tutt and Giller, 1983; Giller and Tutt, 1987; Evans and Wilkinson, 1990; Evans, 1993).

Nonetheless, by the late 1960s the police caution for young people who offended had:

> 'won the support of successive Conservative administrations (Home Office, 1980, 1984; liberals (Schaeffer, 1980; radicals (Smith, 1984) and juvenile justice pressure groups (Association for Juvenile Justice, 1985)' (as cited in Pratt, 1986:212),

and continued though throughout the 1970s and 1980s as a recognised but non-statutory police function, and an accepted disposal for young people with no or few antecedents who committed less serious offences (Ball, 2004).

The uncertain legal status of diversion was reflected in a 1976 study of the Juvenile Court, which found that:

> 'Juveniles are not to be brought before the court if they can equally well or better be dealt with by more normal means. Persons who may be concerned in bringing proceedings are therefore required or encouraged to explore alternative possibilities before arriving at a decision' (Cavenagh, 1976:2).

Home Office Circular 59/1990 encouraged the diversion of young people from the criminal justice system, and advocated there was:

> 'widespread agreement that the courts should only be used as a last resort, particularly for juveniles and young adults; and diversion from courts by means of cautioning or other forms of action may reduce the likelihood of re-offending. These factors would support a policy within which cautioning is used for a wide range of offences and offenders' (Home Office, 1990).

The Circular additionally emphasised the desirability of multi-agency decision making in diversionary processes and the continued need for improved consistency of practice (Evans, 1994). Given that within less than a decade this policy became inimical to the political and public mood, Home Office Circular 59/1990 arguably represents the highpoint of official recognition and promotion of diversionary practices for young people who offend.

At the same time however, the increasing formalisation and use of the police caution had displaced the victim 'from their one empowered position' to invoke personal discretion over the prosecution and punishment process, and had shifted it to the state (Kirchengast, 2006:159). In response, victims' advocacy became increasingly mobilised and campaigned that cautioning practices were made with little bearing on the needs or wishes of the victim, denied them the opportunity to secure compensation or reparation and to also have an offender held publicly to account (Shapland, et al, 1985).

Left-realist criminologists, who were critical of left idealists' failure to recognise the effect of crime on the working class, similarly contended that cautioning practices and models of minimum or radical non-intervention often put the needs of the offender above those of the victim (Young, 1986). In consequence, a Victim's Charter (Home Office, 1990a) was introduced and sought to give greater emphasis to the rights of victims and bring greater parity to decision making processes (Davis, et al, 1989; Dignan, 1992).

Although the Home Office claimed the police caution was highly successful in preventing recidivism and actively promoted its use (Home Office Statistical Bulletin, 1992; Home Office Statistical Bulletin, 1995; Bateman, 2012), it still failed to implement any consistent uniformity of practice despite frequent issue of further guidelines and National Standards (Parliamentary All-Party Penal Affairs Group, 1981; Home Office, 1976; Home Office, 1980; Home Office, 1985; Home Office, 1990; Wilkinson and Evans, 1990). This

period also saw a significant increase in the cautioning of young people who offended (Bottoms, 1974; Rutherford, 1992), reaching a peak in 1992.

The Crown Prosecution Service (CPS) was established in 1985 in part to bring greater consistency to the decision making process, with an identifiable remit to develop specialist juvenile prosecutors (Timmons, 1986) and divert young people who offended wherever possible (Crown Prosecution Service, 1986). The police though continued to retain primary responsibility for out of court disposals for young people who committed low level offences and the CPS only intervened in more complex cases (Home Office, 1990).

4.17 Radical Diversionary Models

In certain regions, notably Northamptonshire, there operated between 1981 and 1992 a progressive multi-agency diversionary regime led by Juvenile Liaison Bureaus (LBJs), which comprised of social workers, probation officers, police constables, teachers and youth workers (Kemp, et al, 2002). The Northamptonshire model, heavily influenced by labelling theory advocates (Becker, 1963; Matza, 1969; Lemert, 1967; Schur, 1973; Home Office, 1980), operated on principles of minimum intervention or judicious non-intervention, and sought to keep young people who had offended outside of all formal and recordable processes wherever possible and not intervene in the:

> ‘near relatives of delinquency such as truancy and disruptive behaviour’ (Davis et al, 1989:219).

LBJs promoted diversion by way of no action at all for trivial offences, informal action or an informal warning for the majority of young people who offended, or a formal caution for more serious offences. Decision making was premised on the presumption that a formal charge was a last resort and unlike traditional diversionary models, LBJs sought to divert both first time and persistent offenders, and also divert even when serious offences had been committed (Tutt and Giller, 1983; Davis, et al, 1989; Bell et al, 1999).

Although LBJs were technically an advisory body to senior police officers who retained their traditional authority to determine the outcome, their recommendations were ordinarily accepted and the historical jurisdiction of the police to determine the outcome for young people who offended was in practice considerably diminished.

Despite the Northampton model perhaps embodying the most 'true' diversionary process undertaken in England and Wales (Cohen, 1985:51), and the fact it was primarily benevolent in intention, it, together with other similar models, failed to attract universal support. LBJs and the diversionary theories which drove it were criticised for having unaccountable discretionary powers, inconsistent decision making, and 'uncertain philosophy' (Evans and Ellis, 1997; Davis et al, 1989:232); failing to give suitable consideration to the views of victims or parents, and substituting judicial decision making for a new model of unaccountable administrative decision making. Davis et al argued that:

> ‘It is easy to forget that the juvenile court was itself devised as a means of diverting children from the more formal court procedures applied to adults. Now we find that administrative decision making is justified on the basis that an appearance in the juvenile court is itself a step on the downward spiral of imprisonment and recidivism. If follows that we need to invent complex pre-prosecution processes which delay the young person’s arrival not at the prison door, but at the *court* door…if that is the problem, one wonders why it is not tackled directly (Davis et al, 1989:234).

Similar diversionary programmes in the United States were criticised as:

> ‘Increasing the number of programs for juvenile offenders is incompatible with the idea of diversion from the system: New programs, however we label them, are certainly a part of the overall system for responding to delinquency, and sending youngsters to those programs cannot fairly be characterized as keeping them out of the system’ (Bullington, et al,1978:66).

Others argued, not unlike Platt’s criticisms of the nineteenth century ‘child-savers’ who established judicial and correctional institutions which unintentionally resulted in increased punitiveness for children and young people, that the minimal intervention principles operated within the Northampton model were too radical for socially acceptable practices at that time and contributed to a reactionary backlash against diversionary

practices and the subsequent emergence of a more punitive youth justice system (Davis et al, 1989).

4.18 Continuing regional disparities in the operation of the police caution and diversionary disposals

Despite the efforts of the Home Office throughout the 1980s and early 1990s to improve the consistency of police cautioning for young people (Home Office, 1985; Home Office, 1990; Home Office, 1994), there remained considerable regional disparity in practice and procedure (Seeba, 1967; Gelsthorpe and Giller, 1990; Pitts, 1990; Wilkinson and Evans, 1990; Evans and Wilkinson, 1990; Westwood, 1991; Evans, 1991; Evans and Ellis, 1997; Worrall, 1999; Bateman, 2002; Kemp and Gelsthorpe, 2003).

Tensions between the historical authority and jurisdiction of regional police authorities to determine their own youth justice cautioning practices, and government initiatives to implement consistent practices and procedures emerged, with the police arguing that Home Office initiatives reflected an urban policing model, to the disadvantage of rural policing, and also failed to recognise necessary geographical variances in policing methods (Hirst, 1994).

Despite government initiatives to centralise policy making concerning diversionary measures for young people who offended, certain police areas, such as Hampshire and Northumbria, scaled back or abolished entirely their juvenile bureaux's on cost efficiency grounds and introduced their own 'instant caution' procedure; where a young person suspected of committing

an offence would be taken to a police station, their antecedents examined, and if considered suitable for a caution their parents invited to attend and within only a few hours of their attendance a caution was issued, with no multi-agency liaison as to the suitability of this or any other disposal (Tutt and Giller, 1983).

Contrarily, other regions established:

> ‘sophisticated diversionary partnerships and inter-agency relationships …between the police, social workers, probation officers and education professionals which pluralised agency decision making and served (to some extent at least) to diffuse the power and influence of the police’ (Goldson, 2000:36).

In an ostensive rejection of Home Office youth cautioning guidelines which encouraged greater use of the formal police caution, ACPO also introduced their own guidance for regional police forces, and in direct contrast to the Home Office Guidelines, encouraged a greater use of informal warnings, as opposed to a formal caution, for the most trivial of offences, or where it was impractical to issue a formal caution (ACPO, 1995).

4.19 The police caution and the ‘bifurcation’ of youth justice

Although the 1980s were described as ‘a decade of diversion’ (Dignan, 1992:453), and generally dominated by the notion that a prosecution should be a last resort (Evans, 1991; Graham, 2010), youth justice diversionary policies increasingly reflected the ‘bi-furcation’ (Bottoms, 1997:88) or twin

tracking of criminal justice. Police cautions for young people arguably began to fall outside of a true definition of diversion, or the:

> ‘The process of keeping offenders and other problem populations away from the institutional arrangements of criminal justice or welfare’ (Lee, 2013:102),

when they officially became citable in any Juvenile Court hearing (Home Office, 1978; see also Goldson, 2002).

Home Office Circular 14/1985 ‘The Cautioning of Offenders (Home Office, 1985) however still actively promoted the use of the police caution and informal disposals, and greater emphasis was placed on the benefits of other non-custodial sentences (Pitts, 1988; Evans and Wilkinson, 1990; Rutherford, 1992; Charman and Savage, 1999:193). Conversely though, increasingly punitive sentences were encouraged for young people considered to have committed more serious offences (Koffman, 2006; Koffman and Dingwall, 2007) and there was a ‘rise in vindictiveness’ of sentencing policies for serious offences (Pitts, 1998:40).

By the early 1990s however the diversion of young people who offended from formal processes came under increasing criticism and:

> ‘it is difficult to envisage a policy reversal [so great] in any area of public policy’ which took place ‘from a point somewhere in 1992’ (Charman and Savage, 1999:195).

4.20 The ‘new youth justice’ and the demise of the police caution

The politicisation of police cautioning began in the 1990s during the period of the Conservative government, and measures to restrict its use and other diversionary measures were implemented by them (Pitts, 2003; Graham, 2010)). In 1994 the Conservative Home Secretary initiated another rotation in the ‘cycle of youth justice’ (Bernard, 1992) or ‘circular motions’ (Goldson, 2013a:3), and reversed almost twenty years of government policy which favoured the diversion of ‘young offenders’ who committed low level offences by way of a police caution (Evans, 1994).

Restrictive guidance was issued discouraging the issuing of multiple cautions (Home Office, 1994); young people were removed from the category of vulnerable people in the National Standards for Cautioning (Ball, 2004); the ‘caution plus’ was introduced which attached a package of intervention to a caution (Home Office, 1994) (though this type of scheme was already operating under various guises in some regions); and the Code for Crown Prosecutors was amended to discourage the presumption that young age alone was a positive pre-requisite for diversion (Crown Prosecution Service, 1994).

Diversionary measures were further subjected to overtly hostile rhetoric, as reflected by Home Office Minister Michael Howard’s declaration that for all offenders, including young offenders:

> ‘From now on your first chance is your last chance. Criminals should know that they will be punished. Giving cautions…to the same

> person time and time again, sends the wrong message to criminals and the police (The Times, March 16, 1994, as cited in Ball, 1995:198).

The opposition Labour Party, in an apparent volte face of its traditional left-ideological position, correspondingly rejected its previous support for welfare based diversionary models, and now decreed that ineffective cautioning practices had contributed to a wholescale crisis in youth justice (Labour Party, 1994; Labour Party, 1995; Labour Party, 1996). Others suggest however that there had been a policy vacuum concerning law and order within the Labour Party (Downes and Morgan, 1997), and until it sought to reposition itself electorally to be 'tough on crime' it had been disinterested in this area of policy (McLaughlin, et al, 2001).

The opposition Labour Party paper 'Tackling Youth Crime: Reforming Youth Justice' characterised the perceived failure of police cautioning practices as a crisis where:

> 'Youth crime is one of the most serious problems facing England and Wales today. Young offenders wreck their chances of leading worthwhile and fulfilled adult lives and they can wreck the lives of those whom they victimise. The current system of repeat cautioning is not working…too many people involved in the system are unclear whether the purpose is to punish and to signify society's disapproval of offending, or whether the welfare of the young offender is paramount' (Straw and Michael, 1996:1).

This alleged ‘substantial retreat…from traditional socialist thinking on crime’ (Brownlee, 1998:313) by the opposition Labour Party resulted in juvenile justice becoming ‘spectacularly re-politicised’ (Goldson, 2000:36) and a ‘veritable paradigm shift’ (Charman and Savage, 1999:192) from mainstream welfare centred youth justice policies began (Muncie, 1999; Pitts, 2003; Gelsthorpe and Morris, 1994).

Youth crime became increasingly hyper-politicised as a consequence of competing political stratagems throughout the 1990s to secure electoral support for law and order, as well as other factors including the ‘political storm’ which accompanied the murder of two year old James Bulger by two ten year old boys (Smith, 1995; Goldson, 1998; Roberts, 2003; Pitts, 2003:10), concomitant escalating tabloid interest in youth justice (Loader, 1996; Reiner, 2007; Jones, 2010) and ensuing electoral anxiety concerning a perceived surge in youth crime and disorder (Haydon and Scraton, 2000; McLaughlin, et al, 2001).

Previously tolerated adolescent nuisance behaviour became increasingly classified as ‘anti-social behaviour’ and necessitated some form of official intervention (Hough and Roberts, 2004; Muncie, 2008), a ‘parenting deficit’ identified as a contributory cause of youth offending (Goldson and Jamieson, 2002:82) and repeat cautioning of recidivist young offenders was especially condemned (Bateman, 2002).

This period of ‘populist punitiveness’ (Bottoms, 1995:18; Brownlee, 1998:313) and ‘penal populism’ (Koffman and Dingwall, 2007:3) concerning

youth justice was précised in the Audit Commission's report 'Misspent Youth', which concluded that repeat police cautioning for persistent young offenders was ineffective, and this cohort was responsible for the majority of crime committed by young people (Audit Commission, 1996:8).

'Misspent Youth' also examined for the first time the economic impact of diversionary and other interventionist disposals, and whether the youth justice system represented 'value for money' (Pitts, 2003:33). It recommended removing from Chief Constables the historical right to determine their own diversionary agenda, and also that diversionary policies become centralised, with local multi-agency teams answerable to a new Youth Justice Board (Reid, 1997; Ball, et al, 2001). Though a highly influential report, Misspent Youth was subsequently subjected to criticism for allegedly sourcing selective and superficial data in order to disingenuously overstate the need for radical reform (Jones, 2001).

Somewhat ironically, and perhaps reminiscent of the inadvertent net-widening consequences of the 'child saver' movement, criticisms of inconsistent cautioning practices by ostensibly welfare based agencies (Nacro, 1993) were cited as evidence of the need for reform by those in favour of a more restrictive and structured youth cautioning model. Concomitantly, the radical left paradigm, which had actively promoted diversionary models, was the subject of not inconsiderable criticism from left-realists, who argued that the effects of crime should not be disregarded in the pursuit of a welfare led ideology, especially as most working class

crime was intra-class, and it was the constituents of the left who suffered most from the adverse effects of crime (Young, 1997).

The traditional operation of the police caution was also further reconsidered in the light of increasingly popular neoteric policing philosophies, which emphasised 'zero-tolerance' for trivial and minor offences, on the presumption that early and aggressive intervention would prevent an escalation in offending, especially by young people, or 'broken windows' theory (Wilson and Kelling, 1982; Bratton, 1998; Rutherford, 2006).

This change in political mood was not commensurate however with statistical analysis of youth crime, which suggested that only 8% of young people received more than two cautions, and no evidence that recidivist offenders were routinely cautioned (Ball, 2004:176). Statistics also suggested that despite some imperfections, cautioning of young people who committed an offence was on the whole a successful practice (Bateman, 2002; Ball, 2004). The authors of Misspent Youth also acknowledged that cautioning:

> 'worked well for first time offenders, and 7 out of 10 are not known to re-offend within 2 years' (Audit Commission, 1996:22),

and even radical diversionary models, such as that operating in Northampton, had elements of exemplary practice (Audit Commission, 1996:46).

Nevertheless, the police youth caution and other diversionary regimes fell spectacularly out of political, tabloid and societal favour, and from 1992 the

number of cautions issued to young people consistently fell (Bateman, 2002), with a consequential increase in the number of young people entering the court system (Evans and Ellis, 1997). This was despite the fact that overall detected youth crime was declining (Bateman, 2002).

4.21 The Crime and Disorder Act 1998 – the end of the police caution

Upon election in 1997, and consistent with its political stratagem to reposition itself as the natural party of 'law and order' (Michael, 1993; Straw and Michael, 1996; Straw, 1997; Labour Party, 1996; Labour Party, 1997; Pitts, 2003) the New Labour government abandoned entirely any previous endorsements of welfare centred policies (Home Office, 1965; Home Office, 1968), and declared in the White Paper 'No More Excuses' that major reform of the cautioning system was necessary as:

> 'Inconsistent, repeated and ineffective cautioning has allowed some children and young people to feel that they can offend with impunity…radical action is now needed' (Home Office, 1997:5.10).

The subsequent Crime and Disorder Act 1998 (CDA) together with the Final Warning Scheme Guidance for the Police and Youth Offending Teams 2002 (as amended 2006) rejected the notion that out of court disposals should be a primarily a benevolent measure to prevent young people who had committed a low level offence unnecessarily entering the criminal justice system, and a prosecution should be a 'last resort'. In response to the delays in delivering police cautions cited in Misspent Youth (Audit Commission, 1996; Home Office, 1997a) diversionary processes were to be

expedited and improved by ‘modernisation through managerialisation’ (McLaughlin, et al, 2001:301)

The CDA abolished the traditional notion and practice of the ‘police caution’, and the ‘caution plus’, and replaced them with an intentionally and inherently punitive alternative (Lee, 1995; Puech and Evans, 2001), the ‘reprimand’ and ‘warning’ (known thereafter as a ‘Final Warning’). Although the CDA unequivocally promoted early intervention, it severely restricted both the opportunities for informal measures and the number of out of court disposals available to a young person. Young people were expected to respond positively to the two or three opportunities given to them to avoid a formal prosecution by way of a reprimand or Final Warning, and failure to do so was to be followed if necessary by ‘significant punishment’ (Leng, 1999; Goldson, 2000:37).

Formal prosecution by way of a charge and subsequent appearance in the Youth Court became mandatory for a third offence, unless a two year period had elapsed from the issuing of a Final Warning and the commission of another offence, when a second Final Warning could be issued (Card and Ward, 1998; Leng, et al, 1998). Though the issuing of a second Final Warning was semantically illogical, under no circumstances could a young person receive more than two Final Warnings, and the commission of a third offence would almost inevitably result in a formal charge and court proceedings.

A prosecution became mandatory even when there was a considerable gap between previous offending and the commission of a new offence, or where there had been a significant change in circumstances, or the latter offence would ordinarily fall within a diversionary disposal under the new Gravity Factor Matrix (contained within the Final Warning Scheme Guidance), which graded offence seriousness and aggravating/mitigating features. The CDA further prohibited young people from refusing to accept a reprimand or Final Warning, and they could be imposed in the absence of a young person's cooperation or consent. Reprimands and Final Warnings were also not available where a young person had conviction, even if that had been issued for a first offence

The CDA did not prohibit entirely informal and non-recordable warnings, admonishments, or on occasion taking no action at all, however it severely restricted these practices. The interventionist principles of the CDA mandated that formal disposals would be issued in the vast majority of cases and informal action should be an exceptional course (Home Office, 1997)

In response to the belief that a parental deficit was a contributor to youth crime, parents were also expected to undertake a more authoritarian role in diversionary processes, and attend and participate when reprimands and Final Warnings were issued (Straw and Anderson, 1996; Williams, 2000; Final Warning Scheme Guidance 2002:9.14; Goldson and Jamieson, 2002).

The CDA was the subject of considerable academic criticism – described as a punitive three strikes rule (Pitts, 1998); the human equivalent of dangerous dogs legislation (Wilson and Ashton, 1998:62); having an ambiguity of principle (Fionda, 1999); an act of institutionalised intolerance (Muncie, 1999); potentially consolidating delinquent identities by deceptive packaging and insidious spin (Goldson, 2000); inimical to the ideal of a just and proportionate response to youth offending (Morris and Gelsthorpe, 2000); punitive and controlling in principle and practice (Evans & Puech, 2001); expurgation of all youth justice knowledge (Jones, 2002); an acceleration and net widening of young people through the criminal justice system (Bateman, 2002); a dramatic penalisation of minor youth offending (Burnett and Appleton, 2004); thrusting 'trouble-makers' too rapidly into the criminal justice system (Commissioner for Human Rights, 2005:81); potentially incompatible with the UNCR and other international instruments concerning children's rights (Lady Hale in *R v Durham Constabulary and another ex parte R* [2005] UKHL 21 at 40-42); a strange blend of authoritarianism and liberalism (Fortin, 2009); inflexible and unjust (Liberty, 2009:3); a legislative communitarian crusade for the benefit of an idealised middle England (Silvestri, 2011); and engendering age discrimination into the criminal justice system (Flacks, 2012). See also (Goldson and Muncie, 2006b), for a summary of other critiques.

Despite the managerial and interventionist principles of the CDA, its emphasis on inter-agency cooperation and the establishment of Youth Offending Teams (Morris and Gelsthorpe, 2000; Goldson, 2000; Bateman;

2002), in practical terms the CDA did not promote multi-agency partnerships at the pre-charge stage. The decision to charge or divert by way of a caution, caution plus or by way of an alternative diversionary package had previously become, to a greater or lesser extent throughout England and Wales, a pluralised inter-agency decision making process (Bell, et al, 1999). The CDA however dissolved these processes and primary decision making authority concerning outcomes for young people who offended was restored to the police and other prosecuting authorities, though with their discretion fettered considerably (Goldson, 2000; Kemp and Gelsthorpe, 2003).

Decision makers were instead provided with a Gravity Factor Matrix (Final Warning Scheme Guidance 2002 (as amended 2006)) to determine the appropriate disposal for young people who had offended, with primary considerations for disposal including the seriousness of the offence, whether an admission had been made, whether there were any relevant antecedents, and whether there were any aggravating or mitigating features of the offence.

The rigid determining criterion for reprimands and Final Warnings under the CDA and Final Warning Scheme Guidance restricted the decision maker's discretion to give proportionate weight to other relevant public interest factors not set out in the Gravity Factor Matrix, including the age of the offender, individual mitigating factors, the need, if any, for punishment, and the interests, where relevant, of the victim (Ashworth, 1997: Dingwall and Harding, 1998; Koffman and Dingwall, 2007). The inevitable 'net-widening' and 'up-tariffing' of young people who offended under the CDA and Final

Warning Scheme was especially criticised (Pickford, 2000; Evans and Puech, 2001; Nacro, 2000; Bateman, 2002; Pitts, 2003).

The CDA also restricted the capacity of decision makers to balance their statutory obligations under the CDA with other competing statutory considerations, including taking into consideration the welfare of a young person and what outcome is in their best interests (Section 44 Children and Young Persons Act 1933 and Article 3(1) of the United Nations Convention on the Rights of the Child), and what outcome best prevents a young person committing further offences (section 37(1) Crime and Disorder Act 1998).

The courts however consistently sought to favourably interpret into the Final Warning Scheme Guidance the inherent right of decision makers to deviate from it - however these were usually cases where decision makers deviated by way of prosecuting young people who were eligible for a reprimand or Final Warning under the Gravity factor matrix (*D,B v Commissioner of Police for the Metropolis, Crown Prosecution Service, Croydon* Justices [2008] EWHC 442 9 Admin; *R. (on the application of A) v South Yorkshire Police* [2007] EWHC 1261).

The absence of cases to the contrary is not unsurprising though, given the improbability of any party seeking a judicial review of a decision not to prosecute a young person who should have been charged, and it may be that decision makers benevolently exercised their discretion outside of the rigid scheme more often than is recognised or known.

The inexorable political hype concerning the perceived failures of repeat cautioning of recidivist young offenders arguably extended from the political to the judiciary. When the High Court was obliged for the first time in *R v Durham Constabulary and another ex parte R* [2005] UKHL 21 to consider the operation of the CDA and Final Warning Scheme Guidance, though it recognised that out of court disposals were

> 'often a constructive and pragmatic response to offending by young people when a formal prosecution is unnecessary' (Lord Bingham:33),

it also unquestionably accepted the prevailing political rhetoric that:

> 'significant numbers of persistent young offenders were cautioned time after time…the procedure did not achieve its intended objective of stopping young offenders in their tracks before they had time to be habituated to a life of crime' (Lord Bingham:4).

The effect of the prevailing political hostility towards cautioning practices on Lord Bingham's *obiter dicta* cannot be underestimated, given the absence of any corroborative statistical evidence that recidivist offenders were routinely and excessively cautioned. Lord Bingham's *obiter dicta* arguably does, however, support the hypothesis that youth cultures and youth crime recurrently experience episodes of indignation and outrage – often in the absence of facts or reasoning (Pearson, 1983) - and the practice of the police caution for young people who offended became caught up at that time in the:

> ‘endless and vengeful discussion about what to do with young offenders’ (Curtis, 1999:228).

Despite the court in *R v Durham Constabulary and Another ex parte R* [2005] UKHL 21 endorsing the merits of informal and non-recordable disposals for young people who transgress the law, and recognising that there are always cases which:

> ‘although disclosing a breach of the criminal law, were so trivial as to be properly ignored or dealt with by way of informal and unrecorded advice or admonition’ (Lord Bingham:2),

it found the CDA to be compatible with all international human rights obligations, though Baroness Hale had ‘considerable misgivings’ (paragraph 49) and Lord Steyn did so ‘reluctantly’ (paragraph 22).

4.22 Alternative out of court disposals

Despite the ostensible claim that the CDA would introduce certainty into youth justice processes, within a very short period of implementation other out of court disposals and measures to tackle youth offending were implemented. By 2007 there was acknowledgement by policy makers that the CDA and Final Warning Scheme Guidance had perhaps unnecessarily and disproportionately widened the net of first time entrants into the formal criminal justice system (Home Office, 2005, Home Office, 2006, Home Office, 2007) and:

> ‘Despite the huge investment… the principal aim of the youth justice system, as set out in the Crime and Disorder Act 1998, ‘to prevent offending by children and young persons’, has yet to be achieved in any significant sense’ (Solomon and Garside, 2008:11).

This, together with a number of other factors, including:

- statistical evidence that the managerialist and target agenda had not achieved desired outcomes (Solomon and Garside, 2008);
- persistent criticisms of the rigidity and punitiveness of youth justice policies (Goldson, 2000; Muncie, 2002; Pitts, 2003; Allen, 2007; Flanagan, 2007; Morgan, 2008);
- the early stages of economic rationing which incentivised the use of efficient resources and cost-effective diversionary measures;
- evidence that many minor offences were reaching the courts and this was adversely diverting resources away from persistent offenders (Audit Commission, 2004);
- a subtle change in the climate of opinion as to what constituted proportionate treatment of young people who offended (Mattinson and Mirrlees-Black, 2000; MORI, 2006; Office of Criminal Justice Reform, 2010; Bateman, 2012);
- a general shift away in the political mood away from earlier hostile stances (Smith, 2014:48),

collectively resulted in the development of other diversionary disposals which operated along the CDA and Final Warning Scheme Guidance, and

the ‘green shoots of ambiguity’ (Smith, 2014a:41) in New Labour’s responses to youth crime and youthful misdemeanours.

Increased enthusiasm for diversion, whether formal or informal, was also propelled by increasing support for the previously out of favour labelling theory and the re-emergence of leftist-ideology, which held that system contact was inherently criminogenic and increased the likelihood of further adverse contact with the police (Hine, 2007; Crawford, 2008; Goldson, 2010). Supportive research based on a large scale longitudinal study concluded that:

> ‘The key to reducing offending lies in minimal intervention and maximum diversion…doing less rather than more in individual cases may mitigate the potential for damage that system contact brings…targeted early intervention strategies are likely to widen the net….and early involvement will result in constant recycling into the system…in some cases doing less is better than doing more (McAra and McVie, 2007:315-340).

Conversely however, the alternative statutory and non-statutory out of court initiatives introduced between 2007 and the change of government in 2010 were also promoted as not only closing the perceived ‘justice gap’ - the gap between reported crime and detected crime (Home Office, 2003b) - but also to demonstrate additional political efforts to assuage public anxiety concerning adolescent anti-social behaviour (Crawford, 2009a) and perceptions of:

> ‘binge drinking youths rampaging city streets after dark’ (Measham, 2006:265).

The plethora of new out of court disposals, as discussed further in this chapter, targeted not just statutory and common law criminality but also ‘anti-social behaviour’, reflecting the historical conflict in youth justice policies concerning whether intervention should target not just official breaches of the law by young people, but also their moral and social transgressions (Muncie, 2000). They also reflected the persistent ideological tension concerning diversionary practices, which oscillated between intervention ostensibly targeted at recidivism, and intervention within a criminal justice context primarily for the care and protection of young people (Home Office, 1927, 1960, 1968, 1976; Nejelski, 1976; Dingwall and Harding, 1998; Goldson, 2000; Bateman, 2002; McAra and McVie, 2010; Richards, 2014).

These measures were primarily however a response to the significant escalation of young people being drawn into formal processes, peaking in 2006-2007 with more than 110,000 young people entering the formal criminal justice system for the first time (Bateman, 2012; Youth Justice Board for England and Wales, 2014). The CDA and Final Warning Scheme Guidance had severely fettered the discretion of decision makers to consider appropriate or proportionate out of court disposals for young people who had had committed low level offences, and where there was no discernible benefit in initiating a formal prosecution.

The desire for greater expediency in the processing of young people who offended was an additional factor in the introduction of alternative out of court summary disposals (Morgan, 2008), and vastly extended police primacy concerning young people (Young, 2008). A notable change of direction from the zeal and intention of the CDA was apparent in the 'Youth Crime Action Plan', which pledged to reduce the numbers of young people entering the criminal justice by one-fifth by 2020 (Home Office, 2008).

In their last months of government New Labour seemingly recognised that the CDA and Final Warning Scheme Guidance had significantly widened the net of first time entrants, and acknowledged this was perhaps 'potentially serious', and resulted in a 'fundamental shift in how justice is delivered'. It maintained however that the additional raft of out of court disposals they had introduced to operate alongside the CDA were pragmatic responses to particular operational challenges which provided the police with a further set of tools to deal quickly and proportionately with offending (Office for Criminal Justice Reform, 2010:2-11).

This thesis argues that the proliferation of out of court disposals outside of the CDA and Final Warning Scheme Guidance was both a response by the government to the unacceptably high numbers of young people unnecessarily entering the formal criminal justice system as a consequence of the severity of the statutory regime, but also as a consequence of police and other inter-agency initiatives intended to creatively circumvent it. Many of the new out of court disposals were outside of any government control, regulation or accountability, and resulted in considerable geographical

disparities of use, which perversely, were not unlike many pre-CDA regional regimes.

Smith also suggests, persuasively, that although there were a number of 'identifiable drivers' in terms of policy shifts as well as practitioner innovations outside of statutory procedures, the extent to which the growth in additional out of court disposals was at all planned or controlled is debatable (Smith, 2014:111).

4.22.1 Penalty Notices for Disorder and Fixed Penalty Notices

Penalty Notices for Disorder (PNDs), which were introduced for adults under sections 1-11 Criminal Justice and Police Act 2001 were extended to 16 and 17 year olds in 2004 under section 87 of the Anti-Social Behaviour Act 2003 (Home Office, 2005, Home Office, 2005a). They were considered a less intrusive measure than reprimands and Final Warnings, and provided a young person with the opportunity to discharge liability for their offending by paying a financial penalty, which ranged from £30.00 - £80.00 depending on the gravity of offence committed.

Unlike reprimands and Final Warnings, PNDs were available to 16 and 17 year olds with a recorded antecedent history, and were introduced as:

> 'an additional method of disposal to officers for dealing with offences which compromise low level, anti-social and nuisance behaviour. The scheme is not designed to cater for serious or repeat offending, but

> subject to that, a PND may be used at any stage in the offending career of a child or young person' (Home Office, 2005:2).

PNDs for 10-15 year olds were piloted between July 2005 and June 2006 however this extension was not rolled out nationally (Home Office, 2005a; Amadi, 2008). A PND could be issued either immediately or at a later date by a constable for a range of 'recordable' and 'notifiable' offences, including low value criminal damage and theft, wasting police time and littering. Payment involved no admission of guilt, however a record of the PND was retained on the Police National Computer and though theoretically not citable in any subsequent proceedings, could potentially be used as 'bad character' evidence during any trial (section 101 Criminal Justice Act 2003) or as evidence for an Anti-Social Behaviour Order (Nacro, 2007).

With remarkable similarity to the known geographical variances in the issuing of police cautions prior to the CDA, there were striking variations in the take-up and use of PNDs by police regions, and an absence of consensus as to where PNDs fitted within the structure of youth justice disposals (Office of Criminal Justice Reform, 2010). Despite this, and although PNDs were an intended diversionary disposal, more than 75,000 were issued between 2006 and 2013 (Youth Justice Board, 2014), many of which were for offences or behaviours which ordinarily may have attracted no more than an admonishment and had previously been formally dealt with as 'No Further Action'.

In addition to PNDs widening the net of young people 'brought within the criminal justice fold' (Morgan, 2011:18; Office of Criminal Justice Reform, 2010; Smith, 2010, Stone, 2011), their terms of reference were such that it was:

> 'difficult for children to be clear about what kinds of behaviour are permissible, and what might lead to PNDs' (Robert and Garside, 2005:5).

Critics of PNDs claimed they undermined the rule of law by reversing the burden of proof and moderating the right to trial by jury, took no account of disparity of means to pay, extended the sub-judicial role of the police, were often issued in the custody suite and not as expeditious or economical as intended, and in the absence of any other targeted intervention was inconsistent with wider government policy to provide supportive intervention in the lives of young people who offended (Young, 2008; Grace, 2014).

The enthusiasm with which the police operated PNDs was also arguably the result of government policy to impose targets on the police for 'offences brought to justice' ('OBTJ'), which:

> 'created a strong incentive for officers to deal formally with low level offences by administering an out of court disposal in order to secure a sanction detection and an offence brought to justice' (Office for Criminal Justice Reform, 2010:11),

and perversely incentivised them to impose a formal sanction when ordinarily informal measures would have been suitable (Morgan, 2008, 2011), and consequently:

> 'the impact of increasing the numbers of OBTJ has simply served to accelerate (albeit it to a breakneck pace) a process that was already underway, to reduce professional discretion and curtail the potential for informal resolution' (Bateman, 2008:4).

Similarly, Fixed Penalty Notices (FPNs) were piloted for young people aged between 10-17 for a range of low level offences, predominantly littering and graffiti, under the Clean Neighbourhoods and Environments Act 2005 and the Anti-Social Behaviour Act 2003 (Department for Environment, Food and Rural Affairs, 2007). The power to issue FPNs was extended beyond the police to include Local Authorities, the Environment Agency and National Park Authorities. FPNs could be issued either immediately or through the post, and were similar in operation to a PNDs. Guidance sought to distinguish the issuing of FPNs between 10-15 year olds and 16-17 year olds (Department for Environment, Food and Rural Affairs, 2006), though FPNs were subsequently restricted to adult offenders only.

PNDs and FPNs were subsequently abolished by the Conservative-led Coalition government as out of court disposals for young people (section 132 and Schedule 23 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012).

4.22.2 Anti-Social Behaviour Orders and Acceptable Behaviour Contracts

Anti-Social Behaviour Orders (ASBOs) and Criminal Anti-Social Behaviour Orders (CrASBOs) were introduced in the CDA (subsequently amended by the Police Reform Act 2002, Anti-Social Behaviour Act 2003 and Serious Organised Crime and Police Act 2005) and operated in a similar manner to an injunction, by prohibiting certain behaviour by any person aged 10 years or more that 'causes or is likely to cause harassment, alarm or distress' to others (Home Office, 2003; Home Office, 2003a; Home Office, 2004). Though ASBOs were not an out of court disposal, they resulted in the emergence of a non-statutory and non-judicial alternative targeting anti-social behaviour, the Acceptable Behaviour Contract (ABC).

The interpretation of what constituted 'anti-social behaviour' has been the subject of considerable study, as the capacious and subjective definition extended beyond actual criminality to include a wide range of activities, misdemeanours and incivilities (Home Office, 2000; *R (McCann) v Manchester Crown Court* [2003] 1 AC 787 at 16; Ashworth, 2004; Ramsay, 2004; Squires and Stephen, 2005; Squires, 2008; Rodger, 2008; Burney, 2009; Crawford, 2009; Millie, 2009). Not unlike other historical interventions which transgressed the boundaries between criminality, juvenile delinquency and welfare needs, ASBOs and ABCs were a conflicting amalgam of civil liberty constraints and public protection imperatives (Ashworth, 2011; Anderson, et al, 2011).

ABCs were pioneered initially by the London Borough of Islington (Home Office, 2003) as a cheaper and simpler alternative to an ASBO, and were ordinarily a written agreement between a young person believed to have engaged in anti-social behaviour, and the police or local authority, and contained both prohibitive and mandatory terms (Sikand, 2006:2.14).

ABCs were subsequently embraced by the Home Office and ACPO (Home Office, 2003a) and adopted by the majority of local authorities and police forces. They embodied the continued conflict between measures intended to benignly avert further offending by young people considered at high risk of doing so, and measures which in practice widened the net of young people entering the criminal justice system absent of any actual criminality.

Though ABCs were ostensibly introduced as a cost-efficient and pragmatic response to increasing public anxiety concerning young people in public places, and an additional measure to keep young people away from more formal procedures (Crawford, 2007a; Mayer, 2008; Home Office, 2007, Home Office, 2007a), they were subject to a number of criticisms. Concerns included processes were coercive and very few young people genuinely consented to either an ABC or the prohibitions contained therein (Squires and Stephen, 2005); they imposed excessive prohibitions for low level, but persistent offending, which ordinarily would have been dealt with informally (Burney, 2009; Padfield, 2004), and as one police officer contended, they were being issued in the absence of other supportive measures, and:

> ‘I have done 400 acceptable behaviour contracts. Not one of those young people were actually doing anti-social behaviour because they wanted to…in the lives of those 400 people, 10% were known to the youth justice system and were going through the courts and getting the support that they would be offered, but 69% were known to child protection due to drugs, drink, mental health issues, tenancy issues, domestic issues in the family, lack of parental guidance or peer group pressure. All these issues were underlying the consequences of bad behaviour’ (Collins and Cattermole, 2006:182).

Though ABCs were on the face of it a voluntary contract between a young person and the local authority or police, and considered a less draconian measure than an ASBO, a refusal to accept an ABC or a failure to comply with an ABC could result in an ASBO being sought, and was citable in any subsequent ASBO application (Koffman, 2006a). Though not a legally enforceable contract and did not contain any sanction for breach, (Ashford et al, 2006:29.3) it was an out of court disposal with considerable punitive and net-widening corollaries.

ABCs further returned to the police their pre-CDA autonomy concerning outcomes for young people who committed low level offences, though during this period some historical vagaries of regional policing was moderated by the amalgamation of forces from 117 to 43 regions, together with the increasing influence of the Home Office, Her Majesty’s Inspectorate of Constabulary and the National Policing Improvement Agency (McLaughlin, 2005; Raine, 2014)

In 2014 the Conservative-led Coalition government abolished ASBOs, having earlier advocated that they were unduly complex, bureaucratic and expensive, and an ineffective initiative with unacceptably high breach rates (around 57%) resulting in them becoming a 'conveyor belt to serious crime and prison' (Home Office, 2010; Ashworth, 2011). The subsequent Anti-Social Behaviour, Crime and Policing Act 2014, replaced ASBOs with Crime Prevention Injunctions and CrASBOs with Criminal Behaviour Orders, however there remains some support for the continued use of ABCs, but with appropriate safeguards (Cornford, 2012; Standing Committee for Youth Justice, 2015).

There is also some contention that the new statutory initiatives targeting anti-social behaviour reflect more of a change of tone than of substance, and:

> 'Over the past 15 years, UK governments have developed a strategy designed to eradicate anti-social behaviour, imbued with the rhetoric of intolerance. Despite some difference in emphasis, the central communicative aspects of this strategy and the rhetoric are maintained in the plans of the current Conservative-led coalition government' (Bannister and Kearns, 2012:393).

4.22.3 Youth Restorative Disposals

Youth Restorative Disposals (YRDs) were a non-statutory police led initiative intended to simplify diversionary processes, mitigate against the rigidity of the CDA and Final Warning Scheme, re-introduce greater

discretion and fairness into diversionary processes (Department for Children, Schools, and Families, 2007) and anticipated as:

> ‘a quick and effective means for dealing with low-level, anti-social and nuisance offending, offering an alternative to arrest and formal criminal justice processing’ (Youth Justice Board, 2011:2; Home Office, 2008a; Criminal Justice Joint Inspection, 2012).

Initially piloted in 2008 by the Association of Chief Police Officers (‘ACPO’) and the YJB, YRDs were available for young people aged 10-17 years with no antecedent history, as an immediate and one off admonishment by the police, but ordinarily combined with some restorative intervention where appropriate or possible. They were recorded locally and not on the Police National Computer (‘PNC’) unless an arrest had been made and an endorsement of ‘No Further Action’ (‘NFA’) was entered on the PNC (Youth Justice Board, 2011).

YRDs were subsequently adopted by most police regions, and were available to any young person with no antecedent history suspected of committing a Level 1 or 2 offence on the Gravity Factor Matrix (Home Office, 2006) and also for offences or behaviours which fell under the newly termed ‘neighbourhood’ crime which incorporated street-level low level offending and nuisance behaviours (Youth Justice Board, 2011).

YRDs also further restored to the police some of their considerable pre-CDA autonomy over the young street populations and outcomes for young people who commit low level offences (Loader 1996; Reiner, 2000), and were

arguably the modern equivalent of the ‘clip around the ear’ (Duckfoot, 2012:8) in lieu of a more formal out of court disposal, though they were still recorded locally. Similarly, YRDs again echoed historical initiatives targeting nuisance behaviour by young people falling outside statutory or common law criminality, but where intervention was considered desirable or necessary. The traditional police remit over young street populations was further enhanced with the creation of Police Community Support Officers, and a greater focus on ‘neighbourhood policing’ (Home Office, 2010a).

The non-statutory YRD Guidance creatively circumvented the rigidity of the CDA, by mandating that diversion by way of a YRD was not incompatible with the Final Warning Scheme if the police considered that issuing a YRD as opposed to a reprimand, Final Warning or formal charge would ‘be sufficient to prevent future offending’ (Ministry of Justice, 2014:3.3).

YRDs were subsequently renamed ‘Community Resolutions’ (CRs) by the Conservative-led Coalition government and have been endorsed as a diversionary process for both adults and young people (ACPO, 2012; Ministry of Justice, 2013) and intended to resolve low level offending and anti-social behaviour in an informal manner, with the consent of all relevant parties, outside of the traditional formal criminal justice processes (Youth Justice Board, 2014). This highly discretionary and unregulated practice now accounts for a significant number of disposals, though there is no accurate or reliable data as to determine to the extent of use (Home Office Statistical Bulletin 2014:12; Youth Justice Board, 2015:15).

4.22.4 Restorative justice and out of court disposals

The Final Warning Scheme Guidance 2002 encouraged the use of 'restorative processes' (paragraph 9.22), when issuing a reprimand or Final Warning, and out of court disposals were expected to, where possible, incorporate the principles of restorative justice. There is no statutory or common law definition of restorative justice however it is generally accepted as affording:

> 'victims the chance to meet or communicate with their offenders to explain the real impact of the crime - it empowers victims by giving them a voice. It also holds offenders to account for what they have done and helps them to take responsibility and make amends… is about victims and offenders communicating within a controlled environment to talk about the harm that has been caused and finding a way to repair that harm' (Restorative Justice Council, 2013:1; see also Braithwaite, 2003 and Bottoms, 2003).

Although some commentators believed the CDA provided an opportunity for restorative justice:

> 'to take root and flourish as an integral part of the criminal justice system' (Dignan, 1999:50),

others were sceptical concerning whether the CDA and Final Warning Scheme Guidance was genuinely seeking to introduce restorative ideals such as mediation, reparation and restoration, and questioned whether

restorative justice was being cynically promoted in order to exculpate a primarily punitive system (Walgrave, 1995; Dignan, 1999; Ball, 2000; Morris and Gelsthorpe, 2000; Puech and Evans, 2001; Koffman and Dingwall, 2007; Newburn, 2007).

Similarly, the 'blanket' use of restorative justice was arguably excessive for low level offences (Bottoms, 2003:110), and the effectiveness of restorative processes doubtful if young people were obliged to engage and were not voluntary participants (Fox, et al, 2006). Additionally, another concern was that the national implementation of restorative processes may re-victimise the victim if inexperienced or unskilled practitioners mismanaged the processes (Roach, 2000; Morris, 2002).

Restorative processes were often incorporated into YRDs, which was primarily a police led initiative affording them considerable sub-judicial authority, and there was some reluctance amongst the police concerning this duty, with:

> 'Senior police…uncomfortable that frontline officers are currently the only arbiters of whether a restorative disposal is used, casting them in the role of 'adjudicator' as well as 'interviewer' (Independent Commission on Youth Crime and Anti-Social Behaviour, 2010:60-61).

4.22.5 Triage schemes

Despite the intention that the CDA and Final Warning Scheme Guidance would impose uniformity of practice for all out of court disposals, consistent

with every other attempt to bring about uniformity, separate regional practices developed outside of the statutory framework. By 2010 there had been an incalculable expansion of diversionary schemes operating outside of the intended rigid statutory framework, and vastly more diversionary schemes than before the CDA was implemented (Independent Commission on Youth Crime and Anti-Social Behaviour, 2010; Audit Commission, 2012; Criminal Justice Joint Inspection, 2012; Department of Health, 2012; Home Office, 2012a).

Triage schemes were established in 2009 (Department for Children, Schools and Families, 2008) and sought to assess young people as they entered the criminal justice system and to:

> 'avoid the unnecessary criminalisation of young people on the fringes of criminal activity' (Home Office, 2012a; Ministry of Justice, 2013a:1).

Decision makers within in Triage - which operated in some police stations but not all - considered when determining the outcome for young people who offended not just the gravity of an alleged offence and any relevant antecedents, but also broader factors including a young person's social care, mental health, and educational and housing needs. Triage processes were intended to identify need and substitute where possible a formal sanction with an alternative package of supported intervention. Though primarily a diversionary process, Triage schemes were ordinarily based at police stations and operated from custody suites post-arrest, and thus

arguably not entirely diversionary, though some schemes also sought to prevent where possible the initial arrest and detention of young people (Home Office, 2012a).

Triage schemes on occasion ran concurrently to other local initiatives within pilot areas, and other regions not part of the official pilot implemented similar schemes, described variously as ‘informal resolutions’, ‘restorative resolutions’, ‘street resolutions’, ‘community resolution disposals’ and ‘Youth Justice, Liaison and Diversion Schemes’ (Walker, et al, 2007; Mackie, et al, 2008; Criminal Justice Joint Inspection, 2012).

Any considered assessment of the effectiveness or otherwise of these schemes was hindered by their often unregulated and/or unsupervised proliferation, the fact that differing diversionary schemes often operated concurrently, and the ‘endless sequence of reforms’ which targeted young people either committing low level offences or who were on the periphery of entering the criminal justice system (Goldson, 2010:155; Home Office, 2012a; Haines, et al, 2012). The development of non-statutory Triage again highlighted the failure of the CDA and Final Warning Scheme to introduce consistency and simplicity into diversionary youth justice practices (Home Office, 1997), and efforts to circumvent it perversely increased inconsistency within pre-court decision making processes.

4.22.6 Youth Conditional Cautions

Despite the intention that the CDA and Final Warning Scheme Guidance was to be the exclusive diversionary regime for young people who offended,

another significant additional alternative out of court disposal, Youth Conditional Cautions (YCCs) were piloted during the last months of the New Labour government. YCCs re-introduced the previously disparaged idiom of the 'police caution' into youth justice discourse, and redolent of the pre-1998 practice of the 'caution plus', was intended as a formal recordable disposal with conditions attached to a diversionary disposal.

YCCs were piloted 2010 for young people aged 16 and 17 years in Merseyside, Hampshire, Norfolk, Cambridgeshire and Humberside and subsequently rolled out nationally by the Conservative-led Coalition government in 2012 under the Criminal Justice Act 2003, as amended by Section 48 and Schedule 9 Criminal Justice and Immigration Act 2008 (Crown Prosecution Service, 2013b; Ministry of Justice, 2010; Ministry of Justice, 2012; Ministry of Justice, 2013b). Although ostensibly diversionary, YCCs are considered by some as a punitive disposal which sets some young people up to fail (Liberty, 2009) and are further examined in this thesis at paragraph 6.10.2.

4.22.7 Out of court disposals and the 'performance landscape'

The OBTJ target (discussed at paragraph 4.22.1) intended that 1.2 million offences were to be 'brought to justice' by way of sanction detection by 2005-2006, though this was subsequently revised down in 2008 to focus on more serious offences (Home Office, 2003b). This contributed to a significant increase in the number of young people receiving formal and

recordable disposals for minor offences or ‘insignificant misdemeanours’ (Flanagan, 2007; Bateman, 2008; Smith, 2014:55).

In response to this escalation, other targets were introduced requiring the police and other partner agencies to reduce the number of young people receiving a reprimand or other formal disposal, and also those at risk of offending, as measured by a First Time Entrants Target (Department for Children, Schools and Families, 2008; Bateman 2009; Smyth, 2010; Allen, 2011; Criminal Justice Joint Inspection, 2012; Audit Commission, 2012; Bateman, 2012; Smith, 2014; Smith 2014a:32).

These targets reflected not only the considerable interest in diversionary measures, but also the overall ‘performance landscape’ of the youth justice system (Office for Criminal Justice Reform, 2010:3.16). A policy of integrated Targeted Youth Support also encouraged the establishment of multi-agency partnerships to co-ordinate efforts to prevent young people entering the criminal justice system, and to address any identifiable welfare needs (Department for Education and Skills, 2007; Allen, 2011; Munro, 2011).

4.23 The New Youth Justice – Again?

New Labour’s intended ‘root and branch’ (Home Office, 1997) reform of youth justice cautioning practices resulted not in the intended simplification of out of court procedures, but rather a prolonged period of procedural instability which contrarily created ‘no legislative stability’ at all (Morgan and Newburn, 2012:523).

This ‘near permanent reform’ (Goldson, 2010: 155) resulted in a:

> ‘melting pot of contending, competing or directly contradictory measures’ concerning the diversion of young people from formal criminal processes (Ferguson, 2007:192; see also Downes, 2008; House of Commons Public Accounts Committee, 2011).

By 2010 and the election of a Conservative-led Coalition Government, the earlier punitive rhetoric and political hype concerning young people who offended had begun to abate, economic issues primarily dominated the political landscape and a ‘determined calm’ emerged in the ‘corridors of Westminster and Whitehall’ concerning youth justice (Morgan and Newburn, 2012:491). On election in 2010, the Conservative-led Coalition government criticised the automatic escalation of young people under the CDA and Final Warning Scheme and claimed that:

> ‘disposals given out-of-court are particularly important and account for over 40% of responses to young offending…under the current system of out of court disposals, young offenders are automatically escalated to a more intensive disposal, regardless of the circumstances or severity of their offence…we believe that this rigid approach can needlessly draw young people into the criminal justice system, when an informal intervention could be more effective in making the young person face up to the consequences of their crime, provide reparation for victims and prevent further offending (Ministry of Justice, 2010a:68).

The Conservative-led Coalition Government was also critical of the proliferation of out of court disposal schemes (Stone, 2011), which although were intended under the CDA to:

> 'provide a progressive and effective response to offending behaviour, provide appropriate and effective intervention to prevent reoffending and ensure that young people who do reoffend …are dealt with quickly and effectively be the courts' (Final Warning Scheme Guidance, 2002: 1.4),

had failed due to the fact that:

> 'Rapid expansion of the types of out of court disposals has caused confusion about how the various disposals fit together, the circumstances in which one would be used rather than another' (Ministry of Justice, 2010a:9).

The Conservative-led Government proposed instead to:

> 'create a clear national framework for dealing with offences out of court…we will also replace the current youth out-of-court disposals with a system of youth cautions, and youth conditional cautions, repeal youth penalty notices for disorder and promote informal restorative disposals' (Ministry of Justice, 2010a:9).

Under the auspices of economic austerity (Yates, 2012) and together with an ideological agenda centred on the 'Big Society', de-regulation, reducing managerialism, increasing localism and increasing discretion within decision

making processes (Hollingsworth, 2012), but again reminiscent of the cyclical vicissitudes of youth justice policies and procedures (Bernard and Kurlychek, 2010), the Conservative-led Coalition Government implemented substantial changes to diversionary processes under the Legal Aid, Sentencing of Offenders and Punishment Act 2012 ('LASPO').

Reprimands, Final Warnings and PNDs were abolished and replaced with youth cautions and youth conditional cautions (YCCs). Significantly, the Conservative- led Coalition Government ended the 'hierarchical escalator' under the rigidly prescriptive CDA and Final Warning Scheme (Stone, 2011:171) and placed no limit the number of youth cautions or YCCs which could be issued, and further extended this out of court option to young people with previous convictions.

Greater use of informal and non-recordable measures such as informal resolutions and warning letters were encouraged and the Anti-Social Behaviour, Crime and Policing Act 2014 was intended to simplify other out of court disposals which targeted anti-social behaviour (Hodgkinson and Tilley, 2011; Home Office, 2011; Stone, 2011; Home Office, 2012).

Though New Labour had by its third term in government established 'early intervention' and 'integrated youth support', (Department for Education and Skills, 2007; Department for Children, Schools and Families, 2008), inequities between the equality of opportunity between socio-economic groups to access these services was identified, as well as concern that the behaviour of lower socio-economic groups and ethnic minorities was

disproportionately targeted as necessary for early intervention (Muncie, 2009).

The Conservative-led Coalition Government amended these initiatives through structural and budgetary changes and re-branded them as 'Targeted Youth Support', merging some early intervention services with Youth Offending Teams, ostensibly to facilitate improved multi-agency early interventions, though economic austerity was arguably a contributory factor (Allen, 2011; Munro, 2011).

A broader economic agenda further resulted in the introduction of 'payments by results' which intended to implement performance-based rewards for successful diversionary interventions ((Ministry of Justice, 2010a:38; Padfield, 2011; Fox and Albertson, 2011). Calculation of this funding was controversial however (Hollingsworth, 2012) and the willingness of local authorities to participate may have:

> 'as much to do with limiting their losses from funding cuts as with initiating major practice innovations' (Smith, 2014a:70).

Despite the absence of reliable data concerning the use of informal disposals, the number of 'first time entrants' to the criminal justice system officially fell from a peak of 94,535 in 2004/2006 to 22,393 in 2013/2014 and the number of formal, recordable out of court disposals decreased from a peak of 94,836 in 2006/2007 to 25,625 in 2013/2014 - (Youth Justice Board, 2006; Ministry of Justice and Youth Justice Board, 2015; Bateman, 2015).

The known use of informal disposals for youth and adult offenders also increased from 0.5% in 2008 to 12% in 2011, though thereafter there is insufficient data to verify with any certainty how often informal action is taken - though it is likely to be considerably higher for young people (Youth Justice Board, 2015).

The uncertainty concerning the nature and extent of local regional diversionary schemes is striking given earlier statutory initiatives to restrict this type of disposal, and presently:

> 'the status of Community Resolutions and other Restorative Justice outcomes is unclear' (Criminal Justice Joint Inspection, 2012:24; see also Youth Justice Board, 2015:15),

Other types of informal measures are now variously known as:

> 'restorative disposals, restorative justice, informal resolutions, restorative resolutions, community resolution disposal, local resolutions, instant restorative justice, police resolutions, neighbourhood resolutions, extending professional judgement, and street resolutions' (Criminal Justice Joint Inspection, 2012:15-16).

The overall effect of the statutory changes introduced by the Conservative-led Coalition Government, together with other factors such as the impact of economic austerity; a national decline in overall offending rates (Bateman, 2012; Office for National Statistics, 2014); new initiatives intended to identify at an early stage the health and 'well-being' of young people (Nacro, 2011:5) and the abolition of the OBTJ - which freed the police from sanction

target arrests and increased their use of informal disposals - together brought about system–wide reductions in the numbers of young people being arrested, those receiving a formal recordable out of court disposal and also entering the formal court system (Smith, 2014).

Bateman suggests these factors also subtly influenced the 'prevailing mood' concerning young people who offended, resulting in a diminution of hostility and increasing approval of outcomes which were fair and proportionate (Bateman, 2012:45; see also Smith, 2014; 57). The opposition Labour Party however argued that:

> 'this success has its roots in the radical changes that began under Labour in 1998' (New Statesman, 2014).

In response to recommendations that greater provision for the health and well-being of young people was necessary to keep them out of the formal criminal justice (Department of Health, 2009; Talbot, 2010; Coleman, et al 2011; Department of Health Department for Children, Schools and Families, Ministry of Justice, 2013a), a 'Youth Justice Liaison and Diversion Pilot' was conducted in six areas and in 2014. Managed by NHS England, the pilot placed mental health practitioners in police custody suites who screened young people for mental health, learning, communication or other vulnerabilities, and facilitated where possible diversion to other supportive agencies outside of the criminal justice system.

Although intended primarily as a diversionary measure, this pilot and other Triage processes have not systematically kept young and vulnerable people

out of the criminal justice system entirely, and perhaps at best kept them only out of court. There is some evidence that triage processes are still issuing formal and recordable out of court disposals, and:

> ‘Anecdotally, this approach has helped identify opportunities where the police can make *conditional cautions* [my italics], such as referral into treatment (Atkinson, 2014:30).

Although the Conservative-led Coalition Government facilitated far greater use of out of court and informal disposals for young people, there remained an absence of clarity concerning the purpose of some of these new measures, and

> ‘it appears that the Government's priority for these diversionary schemes is a form of expedited or ‘fast track’ justice, rather than a more considered, consultative and evidenced diversionary approach’ (Haines, et al, 2013).

A 2014 review of diversionary procedures and the operation of the Youth Court in England and Wales heard evidence from a number of professionals that the term ‘diversion’ lacked clarity and engendered confused practices, and despite considerable statutory initiatives to introduce simplicity and consistency into diversionary processes, it is:

> ‘a ‘post-code lottery...patchwork system of diversion that’s in place. This is because ‘system diversion’ schemes are not universally implemented across England and Wales. The Department for Health

> told us that it currently funds 37 Liaison and Diversion schemes with the aim of achieving 50% coverage by 2015/16. There are also between 50 and 70 Triage schemes in operation' (Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court, 2014:11).

4.24 Devolution and diversionary youth justice in Wales

Although LASPO and the other changes introduced by the Coalition-led Conservative Government operated throughout England and Wales, social policies between England and Wales became increasingly divergent after Welsh devolution in 1999, with Welsh policy makers increasingly focused on the welfare of young people and increasing use of diversionary practices (Haines, 2010). In addition to ratifying the UNCRC 1989, the Welsh Government introduced a number of distinct strategy policies which endorsed young people's universal entitlements and promoted diversionary practices within the criminal justice system in Wales (National Assembly Policy Unit, 2002; Welsh Assembly Government and Youth Justice Board, 2004).

In 2010 the unique Swansea Bureau was also created by YOS officers and South Wales Police. The Bureau operated in a similar manner to the earlier and broadly restorative Northampton Model, and sought to divert young people who offended wherever possible away from formal systems, to treat young people as children first and offenders second, and to tackle the causes of offending through 'positive and prosocial behaviour' (Morgan,

2012; Haines, et al, 2013:171). Diversionary policies in England and Wales thus became increasingly distinct, and should arguably be examined in isolation from 1999 onwards.

4.25 Out of court disposals and procedural fairness

Diversionary measures have always historically been low visibility and sub-judicial processes operated in the main by the police, affording them vast discretionary power as both interviewer and adjudicator in determining and administrating out of court disposals (Evans and Puech, 2001; Cape and Young, 1998). By 2010 the proliferation of out of court disposals accounted for over 40% of all responses to all detected youth offending (Ministry of Justice, 2010a; Youth Justice Board, 2011). By 2014 this figure was perhaps more than 50% - if Community Resolutions are taken into consideration - though the absence of reliable recording of this disposal given the vast number of regional non-statutory diversionary schemes operating outside of government and YJB supervision makes quantifying the actual number of out of court disposals problematic (Ministry of Justice and Youth Justice Board, 2015:14-15).

The introduction of PNDs was a principally sub-judicial disposal, where the police held dual roles of interviewer and adjudicator. Young (2008) argues that the risk of PNDs being issued in the absence of evidence sufficient to bring a prosecution was considerable, and similarly Lord Thomas of Gresford warned that:

> '[PNDs] reduce the burden of proof, remove the safeguards of the court process and impose penalties on an individual who is thought to be committing or to have committed those offences simply on a constable's belief. That is a dangerous principle to bring into the criminal law of this country' (Hansard, 2000: Column.482).

The statutory diversionary schemes (CDA, Final Warning Scheme, PNDs, YCC pilot scheme) did not establish a designated appeal or review procedure outside of the existing judicial review process, and the only avenue for a reconsideration of a decision to issue a reprimand or Final Warning was either via an appeal to a senior police officer, CPS review if the matter reached court, or through a costly and complex judicial review in the Administrative Court (Brownlee, 2007; Crawford, 2008). Though some police regions implemented forms of 'quality assurance schemes' to supervise and if necessary rescind out of court disposals issued in error (Office for Criminal Justice Reform, 2010:15), these were primarily internal police processes and not formal or accessible appeal procedures.

Notwithstanding Baroness Hale's confidence that the courts were an 'effective safeguard' against the improper issue of out of court disposals (*R v Durham Constabulary and Another ex parte R* [2005] UKHL:46), very few PNDs were challenged either at the Magistrates Court or by way of judicial review – despite more than 80,000 being issued between 2004 and 2013 (Ministry of Justice, 2014:22). In 2008 for example only 1% of PNDs were challenged at court (Morgan, 2011), and although this may conceivably be a consequence of exemplary police practice, it is a suspiciously low number.

Although it is a well-established principle that a decision by the police to issue a caution is subject to the right to a judicial review (*R v Bar Council, ex p. Percival* [1991] Q.B. 212; *R v Chief Constable of Kent Ex p. L and R v DPP Ex p. B* [1993] 1 All E.R.; Uglow, et al, 1992), it is realistically an onerous and potentially unaffordable avenue for many who would wish to seek this redress. The courts are also traditionally reluctant in any event to interfere in these decisions unless there are 'exceptional circumstances' (*R (F) v CPS and Chief Constable of Merseyside* [2003] EWHC 3266:77; *R (Mondelly) v Commissioner for the Metropolitan Police* [2006] EWHC 2370); or there has been:

> 'a total disregard of policy…or…a lack of enquiry into the circumstances' (*R v Chief Constable of Police Ex p. L and R v DPP Ex p. B* [1993] 1 ALL E.R. 756; *R v Commissioner of Police of the Metropolis, ex parte Thompson* [1997] 1 WLR 1519),

and:

> 'it will be a rare case where a person who has been cautioned will succeed in showing that the decision was fatally flawed' *(R v Metropolitan Police Commissioner ex parte Thompson* [1997] 1 W.L.R. 1519:1521)

See also *R v Commissioner for the Metropolis, ex parte P* (1995) 160 JP 367; *R. (on the application of A) v South Yorkshire Police [2007] EWHC 1261 Admin*; *D v Commissioner of Police of the Metropolis [2008] EWHC 442 (Admin); Lee v Chief Constable of Essex Police* [2012] EWHC 283

(Admin); Dingwall and Harding, 1998; Stone, 2007; Ellis and Bigg, 2013; Von Berg, 2014).

The decision making process comprises a series of 'significant decision making gateways' (Bateman, 2012:40) and the radical expansion out of court disposals arguably should have necessitated the establishment of an accessible pre-court appeal procedure. This was especially necessary given the proliferation of out of court disposals conferred on the police considerable discretionary decision making powers, and:

> 'low visibility discretion' decisions, [which are] not subject to the same standard of public scrutiny as those decisions which result in court proceedings (Evans and Puech, 2001:796),

and

> 'within this new context of pre-charge decision making, the need to ensure the legal rights of children are properly protected within the early stages of the criminal justice process [are] more urgent' (Kemp, et al, 2011:29).

The need for an accessible and regulated appeals procedure is particularly acute for young people, who ordinarily lack the means or competence to adequately assert their rights or challenge police decision making (Hine, 2007; Hazel et al, 2002; Hollingsworth, 2012). This is especially salient given the judicial review process is often not properly understood or used by adults involved in this process (*R v DPP, ex p. Jones (Timothy)* [2000] Crim LR 858).

The introduction of the Criminal Records Bureau and Criminal Records Certificate System under Part V of the Police Act 1997, which made provision for mandatory disclosure to prospective employers of certain disposals on the Police National Computer, further highlighted the necessity for an accessible appeals procedure. Although reprimands and Final Warnings were intended to be immediately spent upon issue (Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975), enhanced Criminal Record Bureau certificates disclosed these sanctions, and the court recognised the potentially adverse and disproportionate consequences of disclosure for future employment and immigration (Lord Hope in *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410).

The proliferation of out of court disposals also re-ignited the debate between the legitimacy of the police and magistracy concerning jurisdiction over young people who offend. The Magistracy, consistent with its traditional position seeking to retain inherent jurisdiction over young (Parker, et al, 1989), disapproved of the increasing use of out of court disposals, not only on the grounds that they usurped their perceived remit to determine the sanction for even low level offences, but because these disposals lacked in their view sufficient independent scrutiny and monitoring (House of Commons Justice Committee, 2013).

The Right Honourable Lord Justice Leveson expressed similar concern that the beneficial expediency of out of court disposals was jeopardising

principles of procedural fairness, and in a lecture to the Liverpool John Moores University Foundation for Citizenship expressed hope that he was:

> ‘not alone in expressing concern about these powers. It is not a question of not trusting the police or the CPS, or challenging the will of parliament. It goes back to the origins of our system of summary justice, carried out in public by members of the public, appointed as magistrates, whose decisions can be scrutinised by the public, can be the subject of public debate and, if appropriate, appeal to the court in public…where is the mechanism for accountability for these important decisions taken behind closed doors?’ (Leveson, 2010).

The managerialist ethos of the CDA (Muncie, 2000; Newburn, 2003), which fettered the discretion of decision makers, together with the return to the police of significant discretionary powers, and the subsequent proliferation of other out of court disposals, resulted in a substantive shift from judicial to summary administrative justice for young people who offended. Cumulatively, this resulted in the diminishment of a young person’s entitlement to traditional due legal processes (Evans and Puech, 2001; Dingwall and Koffman, 2007; Brownlee, 2007; Morgan, 2008; Young, 2008; Crawford, 2009a; Hollingsworth, 2012).

4.26 ‘Cautioning myopia’ and renewed anxiety concerning cautioning practices

This thesis seeks to highlight the historical variances of political and social attitudes towards cautioning practices in England and Wales. Though the

reform of out of court disposals introduced by the Conservative-led Coalition Government contributed significantly to a decrease in the number of young people being dealt with by way of a formal out of court disposal, and it was hoped that crime and justice would not again be the focus of political posturing (Smith, 2010:380), almost inevitably there were criticisms of the new cautioning practices.

Despite the intense political interest in out of court disposals since the early 1990s, and the recent simplification of some procedures, there is still concern by some that cautioning practices continue to be:

> ‘confusing official guidance documents from various bodies which need to be brought into harmony with one another, and expressed simply and concisely for the benefit of those who administer the cautioning system’ (Leigh, 2013).

Magistrates have again raised concerns that extensive use of cautions is usurping their role, with the Chairman of the Magistrates Court claiming that:

> ‘Every crime has a victim, and every victim deserves some paperwork. If you think that 11,000 individuals were cautioned because of violent crime last year, therefore there were 11,000 victims. None of those victims got compensated by the court’ (British Broadcasting Corporation, 2013).

Victims groups similarly advocated that:

> ‘Cautions mean that victims do not have their day in court…[they] are not enough in most circumstances because a court can impose more robust rulings for victims and strong bail terms’ (The Guardian, 2014).

In response to emerging criticisms of perceived excessive or inappropriate cautioning of offenders, the Justice Secretary Grayling announced that:

> ‘While we should not remove police officer discretion, the public and victims have a right to expect that people who commit serious crimes are brought before a court’ (Ministry of Justice, 2013c).

The recurrent historical myopia concerning youth crime (Pearson, 1983) has recently again resulted in cautioning practices becoming the target of competing political stratagems.

Predictably, the opposition Labour Party Justice Secretary has sought to refocus political attention on out of court disposals, claiming that:

> ‘Under David Cameron’s Government, too many criminals have been getting away with serious crimes…on their watch cautions have been dished out wrongly for serious sexual and violent crimes…slap on the wrist community resolutions meant for minor crimes have instead been used by the police thousands of times for violent offences…this Government’s actions have cheapened our justice system, leaving the public to question whether this Government is truly on the side of innocent victims of crime’ (Khan, 2013).

The Conservative-led Coalition Government subsequently announced a 12 month adult pilot scheme, to be operated in Staffordshire and West Yorkshire, which will abolish the police caution, conditional police caution and all other out of court disposals, and replace them with Community Resolutions and a new disposal – a Suspended Prosecution (though to be initially piloted for adults only). In November 2014 the Conservative-led Coalition Government further announced that:

> ‘It isn’t right that criminals who commit lower-level crime can be dealt with by little more than a warning… it [is] time to put an end to this country’s cautions culture...every crime should have a consequence (Grayling, 2014).

The renewed hostile rhetoric concerning diversionary measures from mainstream political parties suggests that the likelihood of any cessation of the incessant changes to out of court procedures is remote (Ellis and Biggs, 2013:9). Pitts similarly argued in 2003 that the ‘extraordinary’ pre-occupation with youth crime recycles the same time honoured anxieties expressed in the rhetoric of indiscipline and social deterioration, and the monologue concerning young people who offend will continue with ‘relentless banality’ (Pitts, 2003:2-3).

Given this, together with the historical vicissitudes of youth justice diversionary policies, the existing regime under LASPO is unlikely to remain unchanged for any sustained period, and there is little prospect of any constancy of diversionary processes in the near future. Nevertheless, in

2015 the Conservatives secured an outright electoral majority and at present there is no indication they have any immediate plans to reform to current processes or targets. As the Bulger case demonstrated however, constancy of processes in youth justice is at the mercy of high profile events and occurrences, which often propels policies towards punitive processes.

5.0 CHAPTER FIVE: HUMAN RIGHTS AND DIVERSIONARY PRACTICES

5.1 Emergence of human rights for young people who offend

The origins of international law and human rights concerning the field of youth justice date back to 1923, when the International Save the Children Union adopted its own Declaration of the Rights of the Child, which was subsequently adopted in 1924 by the League of Nations as the Geneva Declaration of the Rights of the Child (also known as the World Child Welfare Charter). In 1959 this declaration was expanded and adopted by the United Nations as the Declaration of the Rights of the Child (Hart, 2006). Both declarations were primarily 'moral' in character and derived from a belief that all children should have the right to childhood as a time of play, innocence and protection from the adult world (Stephens, 1995; Gadda, 2008).

Although children's rights movements during this period sought to distance themselves from the earlier moralistic 'child savers' (Platt, 1969:3), they were similarly preoccupied with a child's moral development and prevention of deviancy, and interchanged the ideology of the rights of the child with pragmatic advocacy of the needs of the child (Pupavac, 2001). Neither the 1924 or 1959 Declarations made reference to any specific practice or procedure relevant to youth justice, and were both primarily concerned with broader themes of provision, protection and participation (Alderson, 2000).

Between 1960 and the 1990s the principle of diverting children and young people from formal criminal proceedings wherever possible, and the

promotion of separate and specialist juvenile/youth justice systems, became enshrined in international law (Resolution 40/33 United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 ('The Beijing Rules'; Fortin, 2009; Goldson and Muncie, 2006).

The Beijing Rules mandated that:

> 'Consideration should be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority…the police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings' (Rule 11.1- 11.2),

and domestic youth justice policies should prohibit strictly punitive sanctions, and be proportionate to not only:

> 'the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of society' (Rule 17.1(a)).

Though the Beijing Rules are not binding on member states, they provided a 'clear steer' concerning the importance of diversion to domestic youth justice policy (Goldson and Muncie, 2006:97). Welfare orientated diversionary principles were further underpinned in the subsequent United Nations Convention on the Rights of the Child 1989 (UNCRC), which mandated that:

> ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’ (Article 3(1)),

and,

> ‘Every child alleged as, accused of, or recognized as having infringed the penal law [is] to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society (Article (40(1)),

and that:

> ‘Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected’ (Article 40(3)(b)).

Similarly, the United Nations Guidelines for the Prevention of Juvenile Delinquency (The ‘Riyadh’ Guidelines, 1990) stipulated that youth justice policies should:

> ‘avoid criminalising or penalising a child for behaviour that does not cause serious damage to the development of the child or harm to

> others' (I.3)…official interventions should be 'pursued primarily in the overall interests of the young person and guided by fairness and equity' (I.5(c),

and:

> 'Law enforcement and other personnel… should be familiar with, and use, to the maximum extent possible, programs and referral possibilities for the diversion of young people from the justice system' (paragraph 98).

In 2002 the Charter of Fundamental Rights of the European Union also set out its own set of rules concerning 'the rights of the child' and declared that:

> 'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration' (Article 24(2)).

5.2 Human rights and the 'best interests' principle

The United Kingdom Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 WLR 148 held that this 'best interests' principle had been 'translated' into domestic law under section 11 of the Children Act 2004 and:

> 'This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need

> to safeguard and promote the welfare of children' (Baroness Hale, paragraph 23),

and:

> 'It is 'a universal theme' of both international and domestic instruments that in reaching decisions that will affect a child, primacy of importance must be accorded to his or her best interests…Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them' (Lord Kerr, paragraph 46).

Other international instruments concerning outcomes for children and young people who offended include the United Nations Standard Minimum Rules for Non-Custodial Measures (the 'Tokyo' rules, 1990), the United Nation's General Comment (No.10, 2007) on 'Children's Rights in Juvenile Justice' and the 'European Rules for Juvenile Offenders Subject to Sanctions or Measures' (Council of Europe, 2008).

5.3 The 'new youth justice' and human rights compliance

The United Kingdom has been the subject of recurrent criticism for failing to either adopt measures fully compatible with these rules and conversely implementing incompatible legislation antithetical to a welfare based approach (United Nations Committee on the Rights of the Child, 1996, 2000, 2008; Goldson, 2000; Fortin, 1998; Scraton and Hayden, 2002; Dingwall, 2006; Muncie, 2010; Bateman, 2012; Flacks, 2012). The rigid

decision making processes introduced in the CDA was especially criticised for failing to proportionally respond to minor offending by children and young people, allegedly in breach of a rights compliant youth justice system (Muncie, 2010:204; Hollingsworth, 2012) and:

> 'the U.K. Government has been able with impunity to be contemptuous of criticism from the UN Committee monitoring the UNCRC' (Ball et al, 2001: 1.26).

The removal in the CDA of a child's right to consent to a formal and recordable diversionary disposal was arguably incompatible with Rule 11 of the Beijing Rules and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although LJ Latham in *R v Commissioner of Police for the Metropolis, ex p. Thompson* [1997] 1 W.L.R. 1519 held that in order to comply with Article 6 of the European Convention on Human Rights and Fundamental Freedoms consent should be obtained from a young person before the imposition of a reprimand or Final Warning, his dissenting judgement failed to attract any significant interest.

The New Labour government rejected all criticisms of the CDA and Final Warning Scheme Guidance, and defended it as a necessary amalgam of rights, needs and entitlement which was wholly consistent with international human rights obligations and necessary:

> 'to ensure that, if a child had begun to offend, they are entitled to the earliest possible intervention to address that offending behaviour and

> eliminate its causes…the [CDA and Final Warning Scheme Guidance] will contribute to the right of the children to develop responsibility (United Kingdom Government, 1999, as cited in Fortin, 2009:48-49).

The CDA arguably fell within Hegel's retributivist 'right to punishment' theory; that the criminal law should not be exclusively focused on punishment as a deterrent, a threat or reformation, and that rights an only be safeguarded when those who deserve punishment receive punishment, thus annulling the crime and restoring rights to the offender (Hegel, 1832; Easton and Piper, 2012).

The court in the seminal case of *R v Durham Constabulary and Another ex parte R* [2005] UKHL 21 considered the history of the police caution and other out of court disposals for young people who offended, and whether the CDA and Final Warning Scheme Guidance 2002 was compatible with the United Kingdom's international human rights obligations. The majority found no incompatibility between domestic legislation and international human rights obligations, though Baroness Hale had:

> 'grave doubts about whether the statutory scheme is consistent with the… international instruments dealing with children's rights. The rigidity of the scheme undermines the emphasis given to diverting children from the criminal justice system, propels them into it and on a higher rung of the ladder earlier than they would previously have

> arrived there, and thus seriously risks offending against the principle that intervention must be proportionate' (paragraph 42).

Despite this, the majority in *R v Durham* held that the CDA and Final Warning Scheme Guidance 2002 was compatible with all international human rights obligations, as reprimands and Final Warnings did not represent the determination of a criminal charge since they were not of a penal character and did not to amount to any public condemnation, and the Act and Guidance were intended to promote the welfare of the child (Dingwall, 2006). The potentially adverse consequence of a formal recordable disposal, albeit ostensibly diversionary, on the life opportunities of a young person were seemingly given little weight, or the net-widening consequences of these schemes.

R v Durham Constabulary and Another ex parte R [2005] UKHL 21 is further examined throughout this thesis at Chapters 4.25; 5.3; 6.3; 6.4; 6.5; 6.16; 6.22; 6.29; 7.3; 8.2; 8.3 and 8.6.

The courts have subsequently however expressed concern that the Criminal Records Bureau and Criminal Records Certificate System under Part V of the Police Act 1997 (subsequently amended to the Disclosure and Barring Service) is not compatible with a person's Article 8 ECHR right to a private life (*MM v The United Kingdom,* Application no.24029/07; *R. (T) v Chief Constable of Greater Manchester & Others* [2013] EWCA Civ 25; *R (on the application of T and another) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35).

Enhanced criminal record certificates result in the disclosure of all previous antecedents - even those spent under the (Rehabilitation of Offenders Act, 1974 (Exceptions Order, 1975)), and include all recordable and ostensibly diversionary sanctions outside of the court system. As such, it is 'largely academic' that reprimands, Final Warning, cautions and youth cautions are technically considered spent upon issue, as they are still disclosable if an enhanced criminal record certificate is required (Ellis and Biggs, 2013:7)

Disclosure of formal out of court disposals issued to children and young people for low level offences has the potential to adversely affect subsequent life opportunities to secure employment, undertake voluntary work, or apply for an immigration document, and the consequences of this formal recordable disposal may be grossly disproportionate to the severity of the original offence (Independent Parliamentarians' inquiry into the Operation and Effectiveness of the Youth Court, 2014:13: Bateman, 2014).

Although the statutory changes implemented under the Conservative-led Coalition Government under LASPO has moderated criticisms of the United Kingdom's compliance with international obligations concerning youth justice and human rights (Stone, 2011), the absence of any synchronisation between LASPO and the Disclosure and Barring Service remains arguably an unresolved incompatibly.

It was additionally of significance that none of the respondents who participated in the primary research - police officers, civilian interviewers and legal representatives - raised at any stage the issue of compliance or

non-compliance of human rights obligations and statutory welfare principles (compliance or non-compliance) when discussing either diversionary processes or the admission criterion (Chapters 6.12 and 7.1-7.17).

6.0 CHAPTER SIX: ANALYSIS OF THE ADMISSION CRITERION

It is 'good for children to own up when they have done wrong' (Baroness Hale, *R v Durham Constabulary and another ex parte R* [2005] UKHL: 21:46)

6.1 Historical perspective

Historically, an admission to an offence has been a mandatory pre-condition for a young person to gain eligibility for a formal out of court disposal, and this necessity has pervaded almost every diversionary practice since their formalisation. Failure to make a satisfactory admission can be an immediate barrier to an out of court disposal for a young person who offends, yet despite the critical importance of the mandatory admission criterion there has been a notable absence of rationalisation as to why it should be a central element of diversionary practices.

This is even more curious given that cautioning practices historically afforded decision makers, ordinarily but not exclusively the police, considerable discretion to determine outcomes for young people (Fisher and Mawby, 1982; Hawkins, 1992; Cape and Young, 1998) and the court has also consistently promoted discretionary decision making above any statutory criterion (Dingwall and Harding, 1998; *R v Chief Constable of the Kent Constabulary, ex parte L* and Another [1993] 1 ALL E.R 756; *The Queen on the Application of A v South Yorkshire Police, Crown Prosecution Service* [2007] EWHC 121 (Admin)). The mandatory admission criterion is also seemingly incompatible with other domestic

statutory and international obligations which mandate that decision makers should safeguard and promote the welfare of young people who offend and endeavour when possible to divert them from the formal criminal justice system (Cushing, 2014).

Prior to the formal establishment of youth cautioning practices in the 1970s, determining what, if any, admission criterion operated throughout England and Wales is hindered by the inestimable number of regional cautioning schemes, inaccurate and disparate recording of informal and formal cautions, and the absence of national guidelines (Somerville, 1969; Steer, 1970; Tutt and Giller, 1983; Dingwall and Harding, 1998). Surprisingly, studies which examined regional disparities in youth cautioning practices gave no consideration as to whether the existence or otherwise of differing admission criterion may have contributed to these identifiable variances (Grunhut, 1956; Mack, 1963; Patchett and McLean, 1965; Seeba, 1967; McLintock and Avison, 1968; Somerville, 1969; Watson and Austen, 1975; Ditchfield, 1976; McBarnet, 1978; Nacro, 1986).

The first significant government policy on youth cautioning, *Children in Trouble (*Home Office, 1968), despite promoting and encouraging the use of cautions and intending to improve consistency of use, similarly failed to consider whether there were any identifiable differences in the nature and operation of the admission criterion amongst regional police forces, and whether this contributed to the notable variances of use. It also neglected to examine the necessity or otherwise of the admission criterion, what form

of admission would be reasonable or proportionate, and made no recommendations for a standard admission criterion for regional police forces to use. This was despite the fact that an admission had become a conventional mandatory pre-requisite to a diversionary disposal and was by then seemingly central to diversionary policies and practices.

The first comprehensive review of cautioning practices in England and Wales was undertaken by Steer in 1970, and though his report concluded that substantial regional variations in cautioning policies had developed throughout the twentieth century, he observed that it was customary in most regions that a caution was usually only issued if 'the offence is admitted' (Steer, 1970:5).

Despite identifying that an admission was a mandatory pre-requisite for a caution, Steer did not examine whether any police region had a formal admission criterion, if so whether it was written or operated by custom or convention, and whether any variances or otherwise in the definitions or interpretations of the admission criterion contributed to the wide regional variances in cautioning practices.

Similarly, during the same period, proponents of child-centred welfarist policies advocating greater use of informal and non-recordable measures also omitted to examine why the mandatory admission criterion had become a conventional gateway to a diversionary disposal, whether it was unnecessarily propelling young people into the formal criminal justice system, and why an admission was deemed so necessary that it

outweighed welfare considerations (Lemert, 1967; Schur, 1973; Bottoms, 1974). Given abolition of the mandatory admission criterion would most likely have promoted more flexible processes when determining the outcome for young people who offended, it is surprising that those advocating greater use of informal measures gave so little consideration to such an important feature of diversionary processes.

6.2 The admission criterion – what is it?

Prior to the formalisation of youth cautioning, the proliferation of regional cautioning schemes and their disparate operation hinders analysis of what type of admission was required from a young person in order to again eligibility for a police caution. It is probable however that the admission criterion was broadly uncomplicated, with the simple requirement that:

> ‘the offence is admitted’ (Steer, 1970:5), or:
>
> ‘the juvenile freely admits having committed the offence; and his parents are content with his admission’ (Watson and Austen, 1975:80), or:
>
> ‘the offender admits his guilt’ (Ditchfield, 1976:1), or:
>
> ‘the offender must admit the offence’ (Landau and Nathan, 1983:131).

The first Home Office Guidance on the issuing of police cautions for young people who offended, ‘The Citing of Police Cautions in the Juvenile

Courts', was similarly pellucid, and stipulated that in order to receive a caution, it was necessary that:

> 'the juvenile admitted the offence' (Home Office, 1978),

though this guidance was intended primarily to permit the citation of cautions in any subsequent Juvenile Court hearing and was not intended to provide definitive guidance on cautioning procedures.

The subsequent report of the Parliamentary All-Party Penal Affairs Group examining youth diversionary practices endorsed the regulation and extension of the police caution, but with the proviso that:

> 'all first time minor offenders under 17 *who admit guilt* [my italics] should be cautioned, and this should also be the practice in regard to those who commit a second minor offence' (Parliamentary All Party Penal Affairs Group, 1981:9).

Remarkably, the Group gave no reasoning or explanation as to why all first time offenders could only gain eligibility for a caution if they admitted an offence, even for very young people who offended or if a trivial offence had been committed, and also why an admission should outweigh any welfare considerations. The absence, however, of any notable comment or reaction to this recommendation suggests an admission of some type was uncontroversial and consistent with the status quo, and probably by that time already a feature of most regional cautioning schemes.

By 1985 the mandatory admission criterion as a gateway to a diversionary disposal had become an entrenched diversionary pre-requisite, and accepted and unchallenged by policy makers and most interested groups, even for low level offences or where there were strong public interest reasons to divert a young person from formal court processes. Seemingly without debate however, the simple admission criterion became more rigorous, with circular 14/1985, 'The Cautioning of Offenders', declaring that not only should a young person or 'offender' admit all or some of the facts, but additionally 'recognise his guilt' (Home Office, 1985:1).

Commensurate with the general absence of interest by policy makers, practitioners, the academic community and welfare agencies concerning the criticality of the admission criterion to diversionary outcomes, Nacro's 1988 guide to best practice for the monitoring of juvenile cautioning did not cite at all an admission as a relevant consideration for such purposes (Nacro, 1988). This was regrettable given grass roots movements such as the Sheffield Black Justice Project had already identified that young black males were disproportionately entering the formal criminal justice system for the sole reason that they were reluctant to engage with the police or make any admission in a police interview (Woodhill and Senior, 1993).

The subsequent Home Office circulars 59/1990 'The Cautioning of Offenders (Home Office, 1990) and 18/1994 'The Cautioning of Offenders' (Home Office, 1994), again mandated that an admission was necessary in order to receive a police caution. Neither circular gave any discernible explanation as to why an admission should be an essential element of the

cautioning process, even for trivial or low level offences, and did not expound why it superseded welfare considerations and mitigating features of an offence or offender.

Both circulars primarily sought to promote and standardise cautioning practices. Circular 59/1900 stipulated that:

> 'The offender must admit the offence' (Home Office, 1990: Annexe B.2),

however Circular 18/1994 heightened the standard of admission deemed acceptable and mandated that:

> 'a caution will not be appropriate where a person does not make a clear and reliable admission of the offence (for example if his health is denied or there are doubts about his mental health or intellectual capacity' (Home Office, 1994: Note 2B).

This amendment was, in part, intended to address earlier research which identified the police practice of routinely cautioning suspects in the absence of an admission which could be considered by any reasonable standard unequivocal (Evans, 1993; McConville and Hodgson, 1993; Moston and Stephenson, 1993). Although Circular 18/1994 was intended as a safeguard by ensuring that young people who did not accept any wrongdoing did not have a formal out of court disposal imposed on them, it also (perhaps unintentionally) imposed on children and young people an additional and onerous diversionary pre-requisite which amplified the standard of admission required of them.

The simple admission criterion that an offender 'admit the offence' had earlier been considered by the court in *R v DPP Ex p. B* [1993] 1 All E.R. 756, where it was held that a 12 year old girl with no previous convictions, suspected of committing the offence of theft, was not eligible for a caution for the singular reason that she failed to make an admission. The court found that her young age, previous good character, the statutory obligations upon decision makers to consider her welfare, and the published guidance on the 'positive advantages for society as well as the individual in using prosecution as a last resort' (Home Office, 1985:1) were outweighed by her reluctance to admit the offence. Likewise, failures by the police and the Youth and Community Service (which operated at that time in a similar manner to YOS) to consider any wider issues surrounding her personal circumstances, in the spirit of the relevant Home Office Circulars, had no bearing in the absence of an admission.

Similarly, the court in *R v DPP ex p. B* made no inquiry or distinction between a young person who wilfully *refused* to make an admission and a young person who may have felt *unable* to make an admission. In that case a 12 year old girl had denied the offence despite overwhelming evidence, and there was no discern

ible advantage to her in denying the offence, which denied her the advantages an out of court disposal and resulted in criminal charges. Factors which may possibly have contributed to her denial, such as her young age, immaturity, fear of the consequences of making an admission either of the criminal justice system or parental disapproval, or inadequate

knowledge of criminal processes, were considered less important than whether an admission had been made.

6.3 The 'amplified' admission criterion

The CDA and the Final Warning Scheme Guidance for Police and Youth Offending Teams 2002, as amended 2006 (Home Office, 2006) abolished the police caution and caution plus, introduced the reprimand and Final Warning, strictly limited out of court disposals, with a formal prosecution mandatory for a third offence unless a two year period had elapsed from the issuing of a Final Warning to the commission of another offence, and abolished a young person's traditional right to consent or refuse a formal recordable diversionary disposal (Bateman, 2002).

Although the CDA was promoted as a radical departure from long established practices (Home Office, 1997), it adopted the prevailing practice that an admission was a mandatory pre-requisite for diversion. In this respect the CDA and Final Warning Scheme Guidance 2002 constituted:

> 'not a brand-new diversionary scheme which leapt onto the statute book with the aim of diverting children away from a life of crime. They were, as is clear from the Home Office Consultation Paper, *Tackling Youth Crime, 1997,* and White Paper, *No More Excuses – A New Approach to Tackling Youth Crime in England and Wales*, 1997, Cm 3809, a very considerable toughening up upon what had

> gone before' (Lady Hale, *R v Durham Constabulary and another ex parte R* [2005] UKHL 21:37*)*,

and a continuation of the previous pre-condition that to be diverted from formal proceedings (by way of a police caution), a young person must first admit their guilt.

The CDA and Final Warning Scheme Guidance 2002 were subject to considerable analysis and critique; however, there was an apparent absence of interest in the continuation of the admission criterion as a barrier to a diversionary disposal for young people. Evans and Puech (2001) and Gillespie (2005) are seemingly the only academics who observed that the admission criterion in the CDA and Final Warning Scheme were an impediment to diversionary outcomes for young people, and there is no identifiable evidence that welfare agencies took any interest or issue with this aspect of the new statutory diversionary regime.

This is especially remarkable given the Final Warning Scheme Guidance arguably imposed an admission criterion that was ill-defined, unduly onerous and was arguably applied more rigorously than was intended.

Initially, the statutory admission criterion was uncomplicated, with section 65(1)(c) of the CDA requiring simply that:

> 'the offender admits to the constable that he committed the offence'.

This test was seemingly made more rigorous, however, in the Final Warning Scheme Guidance 2002 (Home Office, 2002) which at paragraph 4.7(c) stated:

> ‘There must be an admission of guilt’,

but further mandated that:

> ‘A reprimand or warning can be given only if the young person makes a clear and reliable admission to all elements of the offence. This should include an admission of dishonesty and intent, where applicable’ (paragraph 4.12).

Unhelpfully, the 2002 Guidance also defined the admission criterion as:

> ‘the young person admits the offence’ (Home Office 2002: Annexe A 3(iii)), and:
>
> ‘the young person admits a specific criminal offence’ (Home Office, 2002: Annexe B).

The only guidance provided to decision makers should a young person fail to make an admission was that:

> ‘If the young person does not make an admission, he or she cannot be reprimanded or finally warned. The police will decide whether to take no further action or to charge the young person, and may seek the advice of the CPS before making the decision’ (paragraph 4.14 2002 Guidance).

The Guidance accordingly strictly fettered the discretion of decision makers to explore a diversionary disposal in the absence of an admission, even in circumstances where this disposal was entirely in a young person's best interests, or there were mitigating reasons why they failed to make an admission.

Annexe G of the 2002 Guidance further set out an example text for a leaflet to be provided to young people and their parent/Appropriate Adult, titled 'A Final Warning and How it might Affect You', and posed the question 'Do I have to accept a Final Warning?'. The model explanation was suggested as:

> 'Final Warnings are only for people who accept they committed the offence being investigated. If you don't accept that you committed the offence you should talk to the Police or the Youth Offending Team about seeking legal advice' (Annex G:54).

Remarkably, this does not include any information that if an admission is not made and it is subsequently decided that there is sufficient evidence for a realistic prospect of conviction and it is in the public interest to proceed, a formal charge was likely to be the only outcome.

The substantially more rigorous admission criterion set out in the 2002 Guidance was considered in *R. (on the application of M) v Leicestershire Constabulary* [2009] EWHC 3640, where the court concluded that it had considerably 'amplified' the original statutory admission criterion (paragraph 12). Although this amplification was perhaps intended to

ensure the quality and consistency of decision making and safeguard the rights of young people by ensuring any admission made was reliable, its practical effect was to impose a complex and onerous pre-condition for young people, which gave no consideration to the difficulties some young people may have in articulating such a high standard of admission. Subsequent evaluations of the implementation of the Final Warning Scheme did for the first time identify that the operation of the admission criterion was problematic and:

> 'Guilt must be admitted before a Final Warning can be given. Police officers interviewed were clear about this basic point. Case studies, however, suggested that admissions of guilt could be contentious and unresolved even though a warning [Final Warning] had been given' (Youth Justice Board, 2004:7).

The operation of the CDA and Final Warning Scheme Guidance, as well as the necessity of the admission criterion, were considered by the High Court in the in seminal case of *R v Durham Constabulary and another ex parte R* [2005] UKHL 21, where a 15 year old youth (R) challenged the decision to issue him with a Final Warning without his consent, in contravention of his right to a fair trial in accordance with Article 6 of the European Convention of Human Rights. A more persuasive ground of appeal was arguably that the answers R gave in his police interview could not by any reasonable standard be considered 'a clear and reliable admission to all elements of the offence' as required by the CDA and Final Warning Scheme Guidance, as R believed he was only admitting to acts

of ‘horseplay’ and not the alleged offence of indecent assault, and as such the Final Warning issued to him would appear to have been unlawful.

6.4 Admissions and shame recognition

Although Baroness Hale in *R v Durham* had ‘considerable misgivings’ (paragraph 49) when ruling that the CDA and Final Warning Scheme were compatible with statutory and international obligations to ensure the welfare of a child is central to the decision making process when young people offend, she nevertheless endorsed the admission criterion as a necessary pre-requisite for a diversionary disposal as:

> ‘it is good for children to learn to take responsibility for their actions: that is part of growing up to be responsible members of society. It is therefore good for children to learn to ‘own up’ when they have done wrong’ (paragraph 46).

Although Baroness Hale ruled that an admission should be ‘voluntary and reliable’ (paragraph 46) and young people should not be induced to make an admission so that they can be ‘let off’ (paragraph 46), she did not distinguish at all between the ideal that although it may be *good* for children to own up, the CDA imposed a rigid statutory obligation that they *must* own up in order to receive a diversionary disposal, and this superseded any welfare considerations.

Baroness Hale’s ratio that it is good for children to ‘own up’ when they have done wrong was also arguably an endorsement of the practice of

shame management, or the invocation of moral regret by offenders (Braithwaite and Braithwaite, 2001; Harris, 2006) within diversionary practices. The notion that:

> 'those who are able to feel shame for their actions will be less likely to offend in the future' (Scheuerman and Keith, 2015:158),

falls within the statutory definition of the purpose of the youth justice system, which is to 'prevent the commission of further offending' (section 37(1) CDA). There is no statutory or common law reference however to the necessity or desirability of requiring young people who offend to express shame or moral regret, and it is arguable that the traditional inclusion of the admission criterion within diversionary processes seeks to adduce from young people not only an admission to the facts of the offence, but also an acknowledgement of shame and moral regret.

6.5 Admissions and Human Rights

Although the majority in *R v Durham* did recognise that decision makers must comply with domestic and international obligations to act in a young person's best interests when they are suspected of transgressing the law, and keep them away from formal processes wherever possible, they still approved the principle that a failure to make an admission outweighed these obligations. The court also held that the mandatory admission criterion was not incompatible with domestic and international human rights obligations, despite the fact that a young person could only receive an out of court disposal if they made an admission.

The UNCRC mandated however that:

> ‘Every child alleged as or accused of having infringed the penal law has at least the following guarantees…not to be compelled to give testimony or to confess guilt’ (UNCRC 1989: Article 40(2)(b)(iv).

The admission criterion was further not considered by the court in the context of the barriers a young person may be likely to experience when asked to make an admission to the police, such as fear of parental admonishment, the pressures of arrest and detention in custody, and the limited opportunities available to make an admission; which were usually in one police interview only.

Baroness Hale did though acknowledge that the information available to young people and their parents or Appropriate Adults had initially been inadequate concerning the likely outcome if they did not make an admission (paragraph 48). Regrettably, this was also not put forward as a ground of appeal on behalf of R.

6.6 Admissions and the proliferation of out of court disposals between 1998 and 2010

By 2007 there was gradual acceptance by policy makers that the CDA and Final Warning Scheme 2002 (as amended 2006) had significantly widened the net of first time entrants into the formal criminal justice system (Bateman, 2009). This, together with a shift in political mood (Smith, 2014a), statistical evidence that managerialist and target agendas had not

achieved desired outcomes (Solomon and Garside, 2008), persistent criticisms of the rigidity and punitiveness of youth justice policies (Goldson, 2000; Muncie, 2002; Pitts, 2003; Allen, 2007; Flanagan, 2007; Morgan, 2008) and a moderation of the castigatory climate of opinion as to what constituted proportionate treatment of young people who offended (Bateman, 2012) resulted in the proliferation of other diversionary disposals operating along the CDA and Final Warning Scheme.

Although these new disposals were promoted as a 'pragmatic response to particular operational challenges' which 'provided the police with a set of tools to deal quickly and proportionately' with young people who offended (Office for Criminal Justice Reform, 2010:2-11), they resulted in divergent practices concerning what constituted an admission, and also whether it should be a mandatory pre-requisite for an out of court disposal.

6.7 Admissions and Youth Restorative Disposals

Guidance issued for non-statutory Youth Restorative Disposals (YRDs) reversed the admission criterion, and introduced an alternative pre-requisite that a young person was eligible for a YRD if:

> 'the young person has not denied outright involvement for the behaviour amounting to an offence or harm' (Ministry of Justice, 2011:4.1(i)).

When operating YRDs however local areas were permitted to 'build upon this [Ministry of Justice Guidance] with their own local guidance', and

ACPO's own guidance did not adopt the statutory admission criterion, but instead recommended a less rigorous and simpler test, namely that:

> 'the offender must take responsibility' (ACPOa, 2012:4),

Analysis of the regional operation of YRDs found that unlike statutory disposals, key considerations for decision makers when deciding whether to issue a YRD were wider factors including:

> 'the wishes of the victim, the national guidance, circumstances of the incident and the demeanour and background of the offender (Youth Justice Board, 2011:4).

It also found that a significant number of victims did not want the young person who had offended to be criminalised, and instead:

> 'simply wanted an apology and an assurance that the young person would not do the same thing again' Youth Justice Board, 2011:24).

Given this, it may be that measures which seek to obtain some form of recognition of harm or apology from a young person, rather than insisting that they make a clear and reliable admission to all elements of an offence, best satisfies the needs of victims - and as such the public interest - in determining whether or not a prosecution should take place. YRDs were later replaced by the Conservative-led Coalition Government and discussed at 2.22.4, 2.24 and 4.94.

6.8 Admissions and Penalty Notices for Disorder

Payment of a Penalty Notice for Disorder (PND) would ordinarily suggest a young person accepted some wrongdoing and was commensurate with an admission. Payment of a PND however was not deemed to be an admission of any wrongdoing or impugn good character, and could not be cited in any subsequent bad character proceedings (*R v Hamer (Gareth)* [2010] EWCA Crim 2053*).*

6.9 Admissions and Acceptable Behaviour Contracts

Acceptable Behaviour Contracts (ABCs) did not require a young person to make any specific admission of criminality or misbehaviour within the broad definition of what constituted anti-social behaviour (Home Office, 2000; *R (McCann) v Manchester Crown Court* [2003] 1 AC 787 at 16; Ashworth, 2004; Ramsay, 2004; Squires and Stephen, 2005; Squires, 2008; Rodger, 2008; Burney, 2009; Crawford, 2009; Millie, 2009). Young people were however invited to sign a contract which:

> ‘specifies a list of anti-social acts in which the person has been involved and which they agree not to continue…This may encourage them to recognise the impact of their behaviour and take responsibility for their actions’ (Home Office, 2003:52).

The nature and type of admission required from a young person for an ABC was thus vague and imprecise, as acceptance of a voluntary, non-enforceable contract to refrain from similar future conduct inferred an

admission of some previous anti-social behaviour, without insisting on a formal admission as such.

The acceptance of the ABC however was citable in any subsequent application for an Anti-Social Behaviour Order (ASBO) or Criminal Anti-Social Behaviour Order (CRASBO) and it could be reasonably inferred in support of the application for either Order that the young person had previously acknowledged his or her anti-social behaviour through their acceptance of the ABC.

6.10 The Conservative-led Coalition Government and the admission criterion

On election in 2010 the Coalition-led Conservative Government acknowledged that out of court disposals accounted for over a third of all known youth offending, and proposed to abolish the rigid diversionary criterion under the CDA and Final Warning Scheme and to simplify diversionary procedures (Ministry of Justice, 2010a:68). Consistent with this position, section 135 of The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') repealed reprimands and Final Warnings and replaced them with a new 'Youth Caution'.

6.10.1 Admissions and Youth Cautions

LASPO however retained the mandatory admission criterion as a pre-requisite to diversion, and stated that a Youth Caution can only be issued if a young person (Y):

> ‘admits to the constable that Y committed the offence’ (66ZA(1)(b)).

Moreover, the 2013 Guidance for Police and Youth Offending Teams similarly adopted the rigours of the CDA and Final Warning Scheme amplified admission criterion and states:

> ‘A Youth Caution can only be given if the young person makes a clear and reliable admission to all elements of the offence. If a defence is raised a Youth Caution should not be given’ (Ministry of Justice, 2013h: para. 4.6).

The inclusion of the enhanced mandatory admission criterion in the Coalition Government’s replacement statutory regime is arguably in tension with their earlier stated intention of promoting a ‘more flexible response’ to youth offending and encouraging greater use of out of court disposals for young people who commit low level offences (Ministry of Justice 2013h: para.1.6). This same mandatory admission requirement also fails, as its predecessor the CDA and Final Warning Scheme Guidance did, to offer any real practical guidance concerning what can be considered a ‘clear and reliable’ admission from a young person, especially those aged as young as 10 years.

6.10.2 Admissions and Youth Conditional Cautions

The Conservative-led Coalition Government additionally formalised in 2012 the Youth Conditional Cautioning (‘YCC’) pilot scheme which had been piloted under the previous government in 2010, and it operated

alongside Youth Cautions as a more robust second tier response to youth offending, and involved a formal recordable caution together with a mandatory package of intervention (Ministry of Justice, 2010; Ministry of Justice, 2012i; 2013b).

Remarkably, although the YCC criterion retained the necessity for an admission, and in order to gain eligibility for a YCC a young person is required to:

> 'admit to the authorised person that he has committed the offence' (Ministry of Justice, 2013b:1.1.3),

the Code for Youth Conditional Cautions does not require an admission to be made during a formal police interview under caution, or to be made prior to the determination that a YCC would be a suitable disposal, and alternatively states:

> '[Although] the offender must admit the offence, the… Act does not require an admission to be made by the young person before the decision maker determines whether a conditional caution is appropriate. However, the offender must make an admission *at the time the youth conditional caution is given* [emphasis added] that he has committed the offence (or all the offences) for which the youth conditional caution is being given (Ministry of Justice, 2013b:14.2)'.

This is arguably the most radical revision to youth justice diversionary practices since the formalisation of police cautioning in the 1970s. It vitiates the traditional need for 'early frankness' and for a young person to

acknowledge guilt at the 'earliest opportunity', abandons the convention that an admission is ordinarily made in a police interview, and also circumvents the established common law requirement that an admission must be made prior to the determination of a suitable disposal (*R v The Commissioner of the Metropolis Ex p. Thompson* [1997] W.L.R. 1519).

6.10.3 Youth Cautions and Youth Conditional Cautions – confused practices?

The YCC admission criterion results in a significant anomaly between the two diversionary schemes established under the Coalition Government, and begs the question as to why an admission and 'early frankness' is not necessary for a YCC, but is for the lesser disposal of a Youth Caution? This is especially perplexing given that a YCC is intended as a more a more robust second tier disposal for offending or an antecedent history that is deemed too serious for a Youth Caution.

The standard of admission required for a YCC is also significantly altered from other previous statutory criterion, and the imprecise notion of a 'clear and reliable admission' is replaced with the more transparent requirement that:

> 'A youth conditional caution cannot be given to an offender who does not make a clear and unambiguous admission to committing the offence when the conditional caution is administered' (Ministry of Justice, 2013b:14.3).

The substitution of the usual statutory requirement that an admission be 'reliable' with the requirement in the YCC Code that an admission be 'unambiguous' also results in the unnecessary operation of separate admission conditions in the two primary diversionary regimes. No discernible explanation for this variance has been offered, and risks consequential confused practices.

The resultant practical complexities of decision making processes for determining eligibility for a YCC are also not inconsiderable. The Code for Youth Conditional Cautions warns decision makers they:

> 'may not offer a conditional caution in order to secure an admission that could then provide sufficient evidence to meet the evidential stage of the Full Code Test (Ministry of Justice, 2013b:5.3).

However, if a young person meets all criterion for a YCC but they have exercised their right to silence in their police interview (Code C 10.5 Police and Criminal Evidence Act 1996 ('PACE')) the decision maker will not know whether a young person is willing to accept a YCC and engage in any diversionary package, and whether to propose such a disposal.

This uncertainty in determining whether a YCC should be offered to a young person exposes both decision makers and young people to the possibility of complex and confusing out of court disposal engagement processes. Similarly, decision makers may be reluctant to explore a YCC in order to avoid any suggestion of improper inducement of an admission. The YCC criterion is also arguably inconsistent with the common law

principle that an offer of a caution should not be made prior to any admission and not before the determination of a suitable outcome (*R v Commissioner of Police of the Metropolis, Ex p Thompson* [1997] 1 WLR 1519).

The YCC criterion also arguably jeopardises the safeguards concerning the questioning of suspects established under s.39 and Code C of the Police and Criminal Evidence Act 1984 ('PACE'). An admission for the purposes of a YCC can now be sought outside of a formal police interview and the custody suite, and the protections concerning the interviewing of young people, such as the tape recording of interviews and the supervisory role of the Custody Sergeant regarding the welfare of the young person whilst being interviewed is diminished.

Conversely however, the YCC criterion may vitiate the need for any police interview and the unnecessary detention of young people in custody for the purposes of securing an admission, as is the current default position for formal diversionary outcomes (Kemp, et al, 2011). The removal of the need for an admission during a police interview may also be of particular benefit to those young people who do not admit an offence not as a consequence of any wilful refusal to acknowledge wrongdoing, but owing to other factors such as fear of parental admonishment, a cultural identification that 'no comment' answers should always be made in a police interview, and the known reluctance of young BME people to engage with the police and make admissions.

Further research concerning the processes and outcomes concerning YCCs will hopefully evidence whether this radically different regime has had any effect on the number of young people securing an out of court disposal who would ordinarily have been formally charged as a consequence of failing to make an admission, and also whether decision makers feel able to offer a YCC in the absence of a clear and reliable or clear and unambiguous admission having been made.

6.10.4 Admissions and Community Resolutions

The Conservative-led Coalition Government replaced non-statutory Youth Restorative Disposals with the broadly similar Community Resolution (CR), and decision making for this informal but recordable out of court disposal remains within the exclusive remit of the police (ACPO, 2012; Ministry of Justice, 2013c; Youth Justice Board, 2014a).

The Association of Chief Police Officers ('ACPO') criterion does not require an admission in order to gain eligibility for a CR, but rather that:

> 'the offender accepts responsibility and agrees to participate in CR and is capable of understanding the situation and process (ACPO: 2012:2.1.2),

and they must have expressed:

> 'genuine remorse' (ACPO, 2012:1.1.2).

Distinct from all other diversionary regimes since the formalisation of youth cautioning schemes, this criterion uniquely omits all reference to an

'admission' as a mandatory gateway to an out of court disposal, and assesses suitability for a diversion with broader concepts of remorse and responsibility. Although CRs do not constitute a conviction in legal terms and as such an admission is not strictly necessary, this criterion still necessitates an acceptance of responsibility, a willingness to engage in diversionary processes and remorse, and as such may be a suitable criterion for Youth Cautions and YCCs, and more suitably achieve the intention of the Conservative-led Coalition Government, as set out in 'Breaking the Cycle' (Ministry of Justice, 2010a).

6.11 Mandatory admissions and the welfare principle – conflicting ideologies?

The opportunities available to make an admission under the CDA and now LASPO are narrow, and with the exception of the YCC criterion, often only available in one police interview. This inflexible approach arguably encourages decision makers to prioritise an admission as the primary gateway to diversion, as opposed to considering other factors such as offence seriousness or the welfare of young people who offend. Serious offences however are likely to result in a formal prosecution no matter what account is given by a young person (Crown Prosecution Service, 2015).

Although a statutory obligation was imposed on the courts almost a century ago to 'have regard to the welfare of the child or young person' (section 44 Children and Young Person Act 1933), no statutory obligation

was similarly imposed on the police. This was despite the considerable jurisdiction the police possessed concerning young people who offended and the increasing recognition of the use of the police caution as a formal disposal.

There is regrettably no statutory definition of 'welfare', though the generally accepted common law definition:

> "connote[s] a process whereby, when all relevant facts, relationships, claims and wishes, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood" (*Re P (A Child) (Residence Order; Restriction Order)* [1999] 3 All ER 734-755 (CA), quoting MacDermott LJ in *J v C* [1970] AC 688 at 710).

This definition arguably lacks lucidity for the purposes of understanding and satisfactorily safeguarding welfare considerations within diversionary decision making processes, and does not sufficiently offset the primacy of other factors in the decision making process which are contrary to welfare considerations, including the need for 'early frankness' and the need for a 'clear and reliable admission to all element of the offence' in order to gain eligibility for an out of court disposal.

The Crime and Disorder Act 1998 made no specific reference to welfare considerations and instead held that the principal aim of the youth justice system was simply to:

> ‘prevent offending by children and young persons’ (section 37(1)).

Despite the nebulousness of both the common law definition of welfare and the statutory definition of the purpose of the youth justice system, the mandatory admission criterion is arguably in direct conflict with both designations, and contrary to other welfare centred statutory duties imposed on decision makers. These include taking into consideration a young person’s age, maturity, personal, social, geographical and educational circumstances, gravity of any alleged offence, aggravating and mitigating features of any alleged offence, previous good character or facts and circumstances concerning previous offending, mental and physical health, any remorse, willingness to engage in a diversionary package, and whether the consequences of a formal sanction would adversely or disproportionately prejudice a young person’s subsequent life opportunities (Crown Prosecution Service, 2013; Crown Prosecution Service, 2015).

The mandatory admission criterion is arguably also contrary to other statutory and non-statutory duties decision makers must comply with when determining what outcome is in the best interests of a young person when they have offended. These are considerable, and include:

i. what outcome best prevents a young person committing further offences (section 37(1) Crime and Disorder Act 1998);
ii. what outcome best prevents criminalising a young person and their escalation through the criminal justice system (Sentencing Guidelines Council, 2009:1.3);
iii. the need to safeguard and promote the welfare of children (sections 1-5 Children Act 2004);
iv. whether a prosecution will have an adverse impact on the future prospects of a young person and is disproportionate to the seriousness of the offending (Crown Prosecution Service, 2013:4.12(d); Crown Prosecution Service, 2015);
v. the obligation to ensure all decisions are consistent with international human rights obligations to act in a child's best interests, use fairness and equity in the decision making process and use a prosecution as a last resort (ECHR, 1950 (as amended); 'The Beijing Rules', 1985; The United Nations Convention on the Rights of the Child, 1989; 'The Riyadh Guidelines',1990; 'The Tokyo Rules', 1990; The Human Rights Act, 1998; The Charter of Fundamental Rights of the European Union, 2000);
vi. the duty to exercise adequate discretion against the prosecution of children and young people who are both victims and offenders (for example those trafficked into unlawful activities such as prostitution or drug cultivation/supply (*R v N; R v Le (vinh Cong* [2012] EWCA Crim 189; Crown Prosecution Service, 2015a);

vii. taking fully into account the views of other agencies and victims in child abuse and sexual offences when determining an outcome (*R (on the application of (1) E (S) and (3) (R) and The Director of Public Prosecutions* [2011] EWHC 1465); and

viii. ensuring a formal recordable criminal disposal is not an automatic response for 'Looked after Children', irrespective of any relevant antecedents (Crown Prosecution Service, 2014b).

6.12 Admissions, welfare and the competing need for 'early frankness'

Goldson argues that during the last 25 years:

> 'the distance between child welfare and youth justice has widened and been institutionalised (in England and Wales at least)' (Goldson, 2013a:3).

This thesis argues that despite the innumerable diversionary policy initiatives during this same period, the admission criterion has adversely impacted on child welfare considerations more than any other legislative or policy initiative.

The anomalies between the mandatory admission criterion and statutory welfare obligations to determine an outcome that is primarily in the best interests of a young person who has offended were apparent in *R. (on the application of F) v Crown Prosecution Service and Chief Constable of Merseyside Police* [2003] EWHC 3266, where F, a 15 year old, was arrested together with others of a similar age on suspicion of Taking a

Motor Vehicle Without Consent and Being Carried in a Stolen Motor Vehicle, contrary to section 12 of the Theft Act 1968.

For reasons unknown, F answered ‘no comment’ in his one police interview whilst he was detained in custody, and consequently lost the opportunity to receive a reprimand - unlike those arrested with him who all made admissions and received either a reprimand or Final Warning. Post-charge F requested another police interview so that he could make an admission and also gain consideration for an out of court disposal. The police however refused to offer a second interview and maintained they had no duty to do so under Code C paragraph 16.5 of PACE 1984 (subsequently revised). The court upheld the police decision, declaring the 2002 Guidance encouraged ‘early frankness’ (paragraph 56) from young people who hoped to receive an out of court disposal, and a reprimand or Final Warning should be given post-charge only in exceptional circumstances if a satisfactory admission is not made at the outset.

The court further rejected the argument, on behalf of F, that only one opportunity to make an admission may be unduly difficult for some young people, especially for those with no prior experience of the criminal justice system, and subject at the time of interview to the pressures of arrest, detention in police custody; often at an unsocial hour. The court held that the police had given sufficient consideration to F’s welfare during their decision making processes, despite F’s later willingness to admit the offence and engage in any diversionary package, and the sole ground for

refusal relied on by the police was that F had not made an admission expeditiously in the proceedings.

The prioritisation of the admission criterion at the expense of statutory welfare considerations was also apparent in *R (on the application of O) v DPP* [2010] EWHC 804, where the court upheld the refusal by the Crown Prosecution Service (CPS) to offer a Final Warning to a 14 year old youth (O) who had put forward a technical defence in his police interview to the offence of possession of a bladed article, contrary to section 1 Prevention of Crime Act 1953, but was also subsequently willing to accept a Final Warning.

O's first account to the police - that he had only recently found the knife and was going to throw it away at the earliest opportunity - was initially deemed a satisfactory admission by the police and a Final Warning was proposed. This was later withdrawn as the Crown Prosecution Service determined that O had raised a defence of 'reasonable excuse' in his police interview, and the circumstances surrounding how F was found to be with the knife and his arrest suggested O's account also lacked sufficient credibility.

O sought a review of the decision to withdraw the offer of a Final Warning, and claimed he had a legitimate expectation that he should be issued with a Final Warning despite a variance of opinion as to whether his account was a satisfactory admission. The court however upheld the CPS decision to withdraw the Final Warning and was satisfied that O had failed to make

a satisfactory admission by either knowingly or unknowingly raising a defence in his police interview. The court held that despite the initial promise of a Final Warning, even if offered in error and which ordinarily would have created a legitimate expectation, (Wells, 2011:8.113), this did not override the fact that O failed to make a satisfactory admission.

In this case, the requirement that an admission be clear and reliable and made at an early stage in the criminal investigation was again considered more persuasive than what outcome was in O's welfare and best interests, his willingness to accept an out of court disposal, and the possibility that his minimisation of culpability was perhaps simply an ordinary consequence of his adolescent immaturity rather than any devious or sinister attempt to deceive the police.

The practicalities of diversionary processes are salient however, and it would no doubt be administratively burdensome to re-interview young people who fail to make an admission without good reason, and then who post-charge seek to change their position in order to secure an out of court disposal. It is also undesirable to encourage those guilty of an offence, no matter what their age, who refuse to admit their guilt and subsequently seek the opportunity to put themselves in the position they would have been had they made admissions at the outset. But such objections are only relevant to the extent that an admission is a pre-requisite to an out of court disposal in any event, and fail to give adequate weight to the ordinary vicissitudes of young people in these circumstances.

In these cases, F was only 15 years of age, had only one opportunity to provide an account to the police, and was perhaps considerably more reliant than an adult would have been on legal advice when he answered 'no comment' in his police interview. His decision not to answer police questions, if indeed made by him and not for him by his legal advisor or Appropriate Adult, was made whilst subject to the pressures of arrest and detention, and although there is no suggestion that his rights whilst in custody were not complied with fully, to what extent F understood the consequences of answering 'no comment' in his one and only police interview is germane.

Similarly, O was also only 14 years of age and the legal elements of the offence of possession of a bladed article were perhaps wholly unknown to him, and he too had only one opportunity to provide an account. Additionally, O did not have the benefit of legal advice, and may simply not have understood that he was putting forward a technical defence, and this would forfeit the opportunity to receive an out of court disposal. This latter scenario seems probable given O was always willing to accept a Final Warning and engage in diversionary processes.

O's minimisation of his own culpability was also arguably commensurate with the predictable 'tempering' of responsibility and accountability by many young people within the criminal justice system, as a consequence of simply their age and immaturity (Zappavigna, 2007). The CDA and Final Warning Scheme, and their successor, LASPO, afford no recognition or guidance to decision makers that a failure to make a clear and reliable

admission is not necessarily commensurate with wilful deceit, and this should in isolation not necessarily be a barrier to a diversionary outcome.

The CDA and the Final Warning Scheme, and now LASPO, also omit any guidance to decision makers to consider the broader circumstances in which a clear and reliable admission is sought at an early opportunity, and that:

> 'Police station custody areas can be very frightening places… for young people. Children brought into police custody may be traumatised or distressed, or under the influence of alcohol or drugs (or their after-effects). A significant number have communication, learning, language or health needs, and many do not understand what is happening to them or the terminology used' (Criminal Justice Joint Inspection, 2011:5).

The decisions to prosecute F and O gave precedence to whether an admission had been made, and not what outcome was in their best interests; despite the willingness of both to accept a diversionary disposal and no other apparent barrier to their suitability. The decisions to prosecute also gave no consideration to the likelihood that F and O's custody experience may have adversely affected their ability to make a satisfactory admission at the earliest opportunity.

These cases also raise the question as to whether the decision to admit or deny an offence, or exercise a right to silence, is in fact made by the young person, or by a legal advisor or Appropriate Adult. The CDA and

now LASPO however hold the young person entirely accountable for this decision.

Furthermore, the desire to ensure that young people who offend not only admit their guilt but also recognise their guilt in order to qualify for a diversionary disposal is also contrary to the principal duty of the youth justice system to prevent offending and ensure welfare is central to decision making processes. The admission criterion diverts attention from these core duties, and is worthy of reconsideration as:

> 'This debate is not about right and wrong. A six-year-old will know the difference between right and wrong but this does not make them criminally responsible. The debate needs to move away from issues of right and wrong and focus on the question of what is the right thing for us to do in relation to children of this age' (All Party Parliamentary Group for Children, 2009/2010:10).

6.13 'Old heads on young shoulders' – are young people able to make a satisfactory admission?

The criminal law makes few concessions to the youth of an accused (Ashford et al, 2006:6.13) and the CDA and now LASPO make no concession for the probability that young people who offend may have little knowledge or understanding of legal complexities. Young people are often confronted in police interviews with questions concerning intention, dishonesty, knowledge, recklessness, foreseeability, possession, joint enterprise, duress, appropriation, and self-defence. These often dense

legal definitions are no doubt far from the grasp of many young people, yet the statutory diversionary regimes expect young people to not just understand them, but to articulate them (Grisso and Schwartz, 2003).

The age of criminal responsibility in England and Wales is 10 years of age (s.16 of the Children and Young Persons Act 1963) and the abolishment of *doli incapax* - the rebuttable presumption that a young person aged between 10 and 14 years was incapable of committing an offence (s.34 Crime and Disorder Act 1998; Bandalli, 1999; Bandalli, 2000; Goldson, 2000; Stokes, 2000; McDiarmid, 2013) resulted in the very youngest of offenders within the criminal justice being subject to the same rigid and enhanced admission criterion as older adolescent offenders, and adults.

Despite international and domestic criticisms of the low age of criminal responsibility (Lipscombe, 2012) it became a requirement for all young people, even the very youngest, that they make either a 'clear and reliable admission to all elements of the offence' under the CDA, and subsequently a 'clear and reliable' or 'clear and unambiguous admission to *all elements of the offence'* under LASPO and the Code for Youth Conditional Cautions. This is despite Code of Practice C 1.5 of PACE recognising that young people, as a consequence of their age alone, are susceptible to interrogative suggestibility and may be prone to providing an account which is unreliable, misleading or self-incriminatory in a police interview (Brookman and Pierpoint, 2003).

The introduction of the rigid and enhanced mandatory admission criterion at the same time as the abolition of *doli incapax* also arguably failed to give sufficient consideration to the fact that if it was recognised that children and young people may not be capable of distinguishing between seriously wrong, naughty or mischievous behaviour (*JM v Runeckles* [1984] 79 Cr App R 255; Farmer, 2011), they may consequently be unable to also articulate a clear and reliable admission to all elements of an offence.

There is a body of research which also found that young people are less likely than adults to understand criminal processes and their rights, even when explained to them in terms which appear child friendly. They are less likely to understand what the right to silence means, especially younger children aged below 12 years, and during the interview process are highly suggestible (Gudjonsson, 1992; Grisso and Schwartz, 2000; Redlich and Goodman, 2003).

This principle was accepted by the House of Commons Justice Committee which found that:

> ‘Children’s ability to understand is constrained by their intellectual development and reasoning capacity. Research shows that younger children tend not to fully understand their rights in a police station and court, even when these are explained to them’ (House of Commons Justice Committee, 2012-2013:114).

One police officer acting as a Juvenile Liaison Officer explained this in similar but rather more colourful terms when accounting for the likely reason a 13 year old boy failed to attend his appointment to receive a police caution for the offence of theft of a can of beans, and said:

> 'This lad is two brain cells below dead' (Lee, 1998:89).

Supporters of the abolition of *doli incapax* however held the firm view that it was an anachronism which permitted young people with a sound understanding of right of wrong to escape justice with impunity (Law J in *C (A Minor) v DPP* [1994] 3 WLR 888; Home Office, 1997).

The complexities of determining whether a young person has made a clear and reliable admission are also considerable, with decision makers faced with a myriad of subjective and objective tests. There are precedents that the age and stage of developmental maturity of an offender may be a relevant factor in assessing whether they are guilty of an offence, and young people who commit an assault can have their age, intellectual capacity and maturity considered when assessing whether they acted reasonably and in the honest belief they acted in self-defence (*R v Shannon* [1980] 71 Cr. App. R. 192). Similarly, if a young person claims they acted under duress, their age is taken into account when considering the reasonableness of their behaviour and their understanding of the immediacy of any threat (*R v Bowen* [1997] 1 WLR 372).

The United States federal judiciary has historically recognised that the account a young person gives to the police should be subject to particular

scrutiny as a consequence alone of their young age, and in *Haley v. Ohio* 332 U.S. 596, 601. (1948) held that:

> ‘when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used …He cannot be judged by the more exacting standards of maturity...[We] cannot believe that a lad of tender years is a match for the police in such a contest (599–601),

and in *Gallegos v. Colorado* 370 U.S. 49, 54 (1962):

> ‘[a] 14-year-old boy, no matter how sophisticated… is not equal to the police in knowledge and understanding’ (370).

The US courts have also at times encouraged a ‘totality of the circumstances’ approach and permit decision makers to consider the circumstances attendant to a young person’s maturity or immaturity when determining whether they were competent to understand the processes adequately (Owen-Kostelnik, et al, 2006:289).

The statutory admission criterion under the CDA and now LASPO however assumes young people adequately understand often complex legal issues, and are competent to articulate a clear and reliable admission to all elements of the offence (should they chose to make one). This requirement is arguably ‘a dangerous blindness to the incapacities of childhood’ (Fionda, 1999:39), illustrative of age discrimination (Flacks, 2012) and contrary to the more benevolent view of Lord Diplock that:

> ‘to require old heads upon young shoulders is inconsistent with the law’s compassion to human infirmity’ (*Director of Public Prosecutions v Camplin Appellant* [1978] AC 705-727(717)).

This ‘responsibilisation and adultification’ (Goldson, 2013:113) of young people within the youth justice system, especially concerning the high standard of participation required as a consequence of statutory admissions, assumes that young people are adequately able to participate in all processes, and understand the consequences of failing to make an admission. It is naïve however to assume that young people, including children as young as ten years of age, are competent to do understand these processes as well as articulate a satisfactory admission.

Similarly, young people are routinely found to minimise their own culpability during police interviews or restorative processes, with variants of this minimisation categorised as ‘shame displacement’ (Scheuerman and Keith, 2015), ‘tempering’, ‘reduced graduation’, ‘heteroglassic distancing’, ‘ideational perspective’ (Zappavigna, 2007), ‘neutralisation’ (Sykes and Matza, 1957) and ‘egocentric bias’ (Lickona, 1983). Studies concerning the relationship between moral reasoning theory and offending behaviour have also identified patterns where young people engage in ‘cognitive distortions’ or ‘non-veridical beliefs’ (Palmer, 2004:102) concerning themselves and their own behaviour, as a psychological defence mechanism to minimise culpability of harm (Kohlberg, 1965; Bandura, 1991; Gibbs, 1995).

The strict requirement that a young person makes a ‘clear and reliable’ or ‘clear and unambiguous’ admission to an offence in order to gain eligibility for a diversionary disposal thus arguably fails to give sufficient recognition to the often predictable denial of offending or minimisation of culpability by young people in police interviews.

6.14 Admissions and *Gillick* competency – a better test?

The complexities of determining a young person’s competency to make informed decisions was considered by the House of Lords in *Gillick (A.P.) (Respondent) v West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security (Appellants)* (England) [1983] 3 ALL ER 402. Although this case concerned the separate issue of whether a person under the age of sixteen years was capable of understanding and consenting to contraceptive advice, young people in custody are arguably faced with more complex decision making processes, whilst ordinarily under the duress of the custody environment and often at an unsocial hour.

Lord Scarman identified in *Gillick* the conflicting distinctions between statutory presumption of competency through age alone, and genuine sufficiency of understanding, and held that:

> ‘The modern law governing…a child's capacity to make his own decisions was considered in *R v D* [1984] 2 All ER 449. The House must, in my view, be understood as having in that case accepted that, save where statute otherwise provides, a minor's capacity to

> make his or her own decision depends on the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit' (paragraph 423).

The court in *Gillick* ruled that the test for a young person's competency to consent was*:*

> 'The child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, so the consent, if given, can be properly described as true consent…it is not enough that she should understand the nature of the advice being given: she must also have a sufficient maturity to understand what is involved' (Lord Scarman, paragraph 424).

If the word 'treatment' in the rigorous *Gillick* test was substituted with 'police caution', 'legal advice' or 'admission', then arguably every young person in custody should be subject to a *Gillick* competency assessment before they participate in police interview. This would better ensure they have a sufficient understanding of the legal elements of the alleged offence and any defence they may have, and also satisfactorily understand the police caution, legal advice, diversionary processes and the likely consequences if they make an admission, provide an equivocal account, deny an offence or exercise their right to silence.

The *Gillick* competency test is arguably a more suitable assessment for young people than the protections currently provided under PACE. It

would place a positive duty on the police, Appropriate Adults and legal advisors to rigorously ascertain whether a young person is capable of understanding the police caution and participate in the interview process. The presence of an Appropriate Adult is routinely deemed a suitable safeguard when a very young person does not adequately understand the complexities of the law and/or the police interview process; however, this is an often inadequate substitution given the identifiable divergences between age, maturity and competency, as well as the known inadequacies of Appropriate Adults (Littlechild, 1998; Pierpoint, 2000; Criminal Justice Joint Inspection, 2011).

6.15 Admissions in Wales

Post-devolution the Welsh Assembly implemented a number of its own distinct youth justice policies, which were considerably more welfare orientated than those operating under Home Office and Ministry of Justice initiatives (National Assembly Policy Unit, 2002; Welsh Assembly Government and Youth Justice Board, 2004). One initiative – the Swansea Bureau – reminiscent of earlier radical diversionary models (such as that which operated in Northampton), strives to proactively keep young people who offend away from all formal processes wherever possible (Haines, 2010; Morgan, 2012).

Even this proactively diversionary scheme, which operates on principles of minimum intervention or judicious non-intervention, has retained however the admission criterion, and young people only gained eligibility for the

diversionary processes operating in the Swansea Bureau if they satisfy three core criterion, the first being that:

> ‘The young person admits they have committed the offence’ (Haines, et al, 2013:172).

Given this, it is conceivable that some young people who would otherwise be suitable candidates for the Swansea Bureau are excluded at the very first hurdle because they do not make an admission. There is seemingly no recognition or interest by those operating or examining this scheme that the inclusion of the mandatory admission criterion may unduly exclude some young people who may have not made an admission for reasons outside of their control, such as inadequate legal advice, influence of the Appropriate Adult or insufficient knowledge of complex legal issues and diversionary procedures. Although this scheme is promoted as having a:

> “a child-rights approach, one where we treat children as children first and serve them by meeting their needs and very often supporting their families (Haines, et al, 2013:182),

the inclusion of the mandatory admission criterion by the Bureau seems on the face it at odds with its benevolent intentions.

6.16 Admissions and erroneous decision making

Prior to the introduction of the rigid mandatory admission criterion in the CDA and Final Warning Scheme Guidance, challenges by way of judicial review of police and Crown Prosecution Service decisions to either issue

or refuse to issue a police caution highlighted instances of deficiencies in understanding by decision makers of both what constituted an admission, and its necessity in diversionary processes. These cases additionally illuminate the historical complexities of the admission criterion within diversionary processes.

In *R v The Commissioner of the Police for the Metropolis* (1996) 8 Admin L.R. 6, a 12 year old boy ('D') had been arrested with his cousin on suspicion of theft of two relatively low value items and issued with a caution, despite categorically denying in his interview that he had been involved in the alleged offence. D accepted in his police interview that he was present when his cousin stole the items, and he knew at the time that the offence of theft was being committed by his cousin. However, he denied any involvement other than mere presence.

The interviewing officer was of the firm view that as D was present he most likely acted as a 'look-out' and misconstrued D's admission to presence with his cousin with an admission to a joint enterprise theft. Although the facts suggest there was no independent evidence that D was involved in the offence, and at no stage did he make any admission as such, the officer concluded the police interview with the declaration that:

> 'He's told us he's there when it happened and he's a guilty party'.

Not unsurprisingly, the court held that none of D's answers could be reasonably considered a satisfactory admission to an offence and the

caution that had been issued to him was quashed. Evans suggests that this was ‘by no means an exceptional case’ (Evans, 1996:106) and a body of similar research also found that in one in five cases young people were being cautioned in the absence of a clear and reliable admission (Evans, 1993; McConville and Hodgson, 1993; Moston and Stephenson, 1993).

Although the requirement for a clear and reliable admission was in part introduced in order to protect the rights of young people, these cases and commentaries also suggest that in practice it has not acted as a safeguard, and is either ignored by some decision makers or a consequentially onerous burden.

Similarly, the seminal case of *R v Durham Constabulary and another ex parte R* [2005] UKHL 21 illustrates the difficulties decision makers experience in determining whether a satisfactory admission has been made for the purposes of eligibility for a diversionary disposal. In *R v Durham* a 15 year- old boy, ‘R’, was interviewed under caution on suspicion of indecently assaulting fellow school pupils, and in his police interview accepted that some of the acts alleged had taken place, but believed these were acts no greater than ‘horseplay’ and no criminal offence had been committed.

R’s answers in his police interview were admissions to acts which in law amounted to a sexual assault, and considered a clear and reliable admission by the police and Crown Prosecution Service who consequently issued R with a Final Warning. This was despite R and his step-father

(acting as his Appropriate Adult) both believing that R had denied any criminality in the police interview, though paradoxically R's step-father was initially supportive of the issuing of the Final Warning, until he later realised it would result in R being placed on a sex offenders register for two and a half years.

The historical absence of any real interest in the admission criterion as a gateway to a diversionary disposal is perhaps reflected by the fact that the potentially persuasive ground for quashing of the Final Warning - that R had not made a clear and reliable admission as he believed he was denying the offence in his police interview - was not argued on his behalf. Those representing R had instead unsuccessfully argued that the CDA and Final Warning Scheme were a breach of his human rights.

R v Durham has been the subject of considerable academic critique (Stone, 2003; Gillespie, 2005; Dingwall, 2006; Dingwall and Koffman, 2006; Flacks, 2012) and is examined further in this thesis at Chapters Analysis of this case has primarily considered the human rights implications of the judgement, and not whether the Final Warning should not have been issued because the admission criterion had not been satisfied. Had R sought to have the Final Warning quashed on the alternative ground that he had not made a clear and reliable admission as he believed his answers were a denial of any offending and any admission was unintended, his judicial review may have had a greater likelihood of success (as discussed further at Chapter 5.3).

In another reported case, *R (on the application of O) v DPP* [2010] EWHC 804, the police were initially satisfied that O had made a satisfactory admission, however the CPS later decided that O had provided a technical defence to the offence of possession of a bladed article when he was interviewed by the police. A reading of the facts of this case suggest it is probable that O intended to admit the offence in order to receive a Final Warning, but he also sought, unsuccessfully, to minimise his own culpability. It also suggests that O's mother, who acted as his Appropriate Adult, was confused by the diversionary processes.

The failure by decision makers to properly assess whether a satisfactory admission had been made was also apparent in *R. (on the application of M) v Leicestershire Constabulary* [2009] EWHC 3640 a 13 year old (M) had challenged the decision to issue him with a Final Warning for the offence of Attempted Rape, contrary to section of the 1 Sexual Offences Act 2003, on the ground that he had not made a clear and reliable admission to all elements of the offence. M had been accused of engaging in unlawful sexual activity with a 13 year old girl whilst in her bedroom and submitted a written statement in his police interview accepting he did lie on top of the complainant whilst his penis was erect and the complainant was asleep, but because of his own sexual inexperience he was not sure whether there was penetrative activity, and he believed the complainant would not object to his actions.

The CPS was satisfied that the written statement constituted a 'clear and unambiguous admission to attempted rape' and referred the file to the

police for a Final Warning to be administered. This was challenged by M though on the sole ground that he had not made a clear and reliable admission.

Despite the court found that the admission criterion in the CDA had been 'amplified' (paragraph 12) by the Final Warning Scheme Guidance, they quashed the Final Warning on the grounds that M's account could not under any circumstances be reasonably considered a 'clear and reliable admission of guilt', as M did not admit that any penetrative activity took place, and he believed he was acting with presumed consent. This case highlights the complexity of applying the admission criterion to young people's understanding of both the law and what they understand to be right and wrong, as well as the failures of decision makers to adequately understand the admission criterion as well.

6.17 Admissions and arrest and detention

The admission criterion presumes that young people exercise rational and considered choice when determining whether to admit an offence or not in a police interview, or indeed at any other stage of the investigation, and makes no allowance for the evidence that suggests 'young people are often in a de-stabilised state as a result of detention' (Littlechild, 1995; Littlechild, 1998:8), the 'coercive power' of arrest often causes them 'alarm and dismay' and can make them 'psychologically vulnerable' (Evans, 1993:25-26; see also Gudjonsson and Clark, 1986). The pressures of arrest and detention in police custody may be a contributory factor when

some young people fail to make a satisfactory admission, and result in the unnecessary loss to them of an out of court disposal.

The importance of arrest and detention in both facilitating and prohibiting admissions by young people, as well determining whether a satisfactory admission has been made, should not be underestimated. Formal out of court disposals account for more than a third of outcomes for young people who come to the attention of the police for the commission of an offence (Youth Justice Board, 2015), and:

> 'Whilst it continues to be the case that the "trial starts at the police station", increasingly that is where the trial will effectively take place and the sentence imposed' (Cape, 2006:v; Jackson 2001).

Although there has been a recent significant decline in the arrests of young people (Youth Justice Board, 2014; Youth Justice Board, 2015), the perpetual cycles of policy changes suggest this is unlikely to be a permanent trend. Statistics also continue to identify that young people are arrested at a disproportionately higher rate than adults (Youth Justice Board, 2014:18).

Given that court processes (at present) are not relevant or applicable to a third of young people who are dealt with formally, a reconsideration of the arrest and detention of young people in order to secure an admission from them to facilitate diversion is necessary. There is no explicit legal requirement that any admission made to a constable for the purposes of

diversion must be made while under arrest and detained in custody, and it has previously been held that an admission made by a young person outside of a formal police interview is *prima facie* admissible evidence against them (*R v M (A Juvenile) Unreported*, The Times, August 23, 1989).

Nonetheless, the current default position is that the majority of young people, including those who express a willingness from the outset to cooperate with the police, are routinely subject to those processes, often in the absence evidence sufficient to merit an arrest in the first place (Evans, 1993). Additionally, arrest and detention is often initiated when there is no need to make an arrest in order to secure or preserve evidence, or the alleged offence is so minor that a formal prosecution is evidentially unlikely.

Although detention in custody may be a salutary experience for some young people and on occasion used by the police as a ‘frightener’ or form of discretionary deterrence (Evans, 1993, Brookman & Pierpoint, 2003), research has found that during the detention and interview process a significant proportion of young people were visibly alarmed, dismayed, afraid, frightened or distressed, and cried at some point during their detention (Evans and Ferguson, 1991). A recent exploration of the experiences of young victims and witnesses in the criminal justice system found that further found that:

> ‘Young people are being left to flounder in an imperfect system…the way the interests of young people are considered must improve’ (Criminal Justice Joint Inspection, 2012a:5),

and there is no discernible reason why the experiences of young people treated as suspects and defendants within the same criminal justice processes are not dissimilar.

Despite these disadvantageous variables, young people are still expected to articulate an admission whilst detained in custody which is either ‘a clear and reliable admission to all elements of the offence’ in order to receive a Youth Caution (Ministry of Justice and Youth Justice Board, 2013h: para. 4.6) or make a ‘clear and unambiguous admission’ to receive a YCC (Ministry of Justice, 2013b:14.3).

There is precedent that an admission made by an adult suspect outside of the custody environment and contrary to a PACE compliant interview can be adequate for the purpose of issuing a caution (*R v Commissioner of Police of the Metropolis Ex P. Thompson* [1997] 1 W.L.R. 1519; *R v Chief Constable of Lancashire, Ex P. Atkinson* (1998) 162 J.P; (*R v Miller* [1998] Crim.L.R. 209) and the court has consistently held that where a clear and unequivocal admission to an offence is made by an adult suspect, it is acceptable for the police to issue a caution, notwithstanding that the admission was not PACE compliant and would have been inadmissible in formal criminal proceedings. The CDA and LASPO however do not extend this same principle to young people, with the consequence that they are

routinely arrested, detained in custody and subjected to the pressures of a formal interview at a police station in order to provide them with the opportunity to make an admission.

The necessity of arrest and detention in order to facilitate a police interview is questionable, and there is a police culture of routinely arresting suspects without sufficiently satisfying the grounds for arrest in Code G of PACE (Edwards, 2009). In *Richardson v Chief Constable of West Midlands* [2011] EWHC 773 the court held that the arrest of an adult suspect who voluntarily attended the police station and expressed from the outset a willingness to participate in a police interview, irrespective of what account he gave, was unlawful, as there had been no necessity in securing his detention. The police assertion that Richardson's arrest had been a 'practical and sensible' decision was held to be unfounded.

For those young people suspected of committing a low level offence, who also express from the outset a willingness to participate in a police interview - irrespective of whether they make an admission or not - their arrest and detention would ordinarily not satisfy the mandatory statutory criterion of necessity and proportionality, and are *prima facie* unlawful (Cape, 2011:2.11).

Most police stations do not have a designated area to interview volunteers outside of the custody suite which has the necessary equipment to tape or video record a police interview, and they are ordinarily only available in custody suites. A decision to detain a young person in a custody suite for

an interview also ensures they receive all of the rights and safeguards afforded to suspects under PACE, especially the right to free legal advice.

6.18 The police interview and admissions

> ‘It has now become something of a truism to observe that, in most criminal cases, the crucial stage is the interview at the police station, for it is at that stage that a suspect's fate is as a rule sealed’ (Baldwin, 1993:326).

The interrogation of young people in police interviews is the central gateway to eligibility for an out of court disposal, and is ordinarily the only forum for affording young people the opportunity to make a satisfactory admission (Quinn and Jackson, 2007). The police are trained to use psychologically manipulative interrogation tactics that may elicit unreliable answers from suspects (Gudjonsson, 2003), and the quality of answers a young person provides in a police interview must thus be considered in conjunction with the wider ‘interrogation context’ of their entire period of involvement with the police, including during arrest and conveyance to the police station, experience of detention in custody, demeanour of the police, nature and type of questions put in interview, the broader tone of the interview, and the competency of the Appropriate Adult and the legal representative, if present, (Evans and Ferguson, 1991; McConville, et, all, 1991; Evans, 1993; Morgan and Stephenson, 1994).

Variables which further influence a young person's decision making process during their period in police custody may include the nature and seriousness of the alleged offence, gender, age, strength of evidence or otherwise, antecedent history, duration of detention in custody, and existence of a co-suspect (Evans and Ferguson, 1991; Moston, et al, 1992; Evans, 1993; Pleasance, et al, 2011; Skinns, 2009; Skinns, 2009a). Other relevant factors may also include a young person's:

> 'memory, their communicative capacities, their social styles and orientation to adult questioners, and their susceptibility to suggestion' (Lamb and Sim, 2013:134).

Despite the importance of the interview process in securing an admission as a gateway to a diversionary outcome, there is a:

> 'marked lack of attention on the part of researchers to the conduct of police interview with juveniles' (Evans, 1993:3),

and

> 'young suspects …are all but invisible in the criminal justice literature' (Brookman and Pierpoint, 2003:453).

There are contradictory research findings as to whether a young person is more likely to make an admission than an adult, and more or less likely to make an admission in a police interview which takes place outside of the custody suite (Gudjonsson, 1984; Evans and Wilkinson, 1990; Evans and

Wilkinson, 1990a, Evans, 1993; Moston, et al, 1992, Pearse, et al, 1998). There is however:

> ‘a large literature which illustrates that the police interview is not a disinterested search for the truth’ (Quinn and Jackson, 2007: 234; Baldwin, 1993),

and the significance of police interview techniques when alleged admissions are scrutinised cannot be underestimated (Gudjonsson, 1992). The ability of a young person to make a satisfactory admission in a police interview must also be considered in the context of evidence which suggests police interviews with young people last on average for only 15 minutes or less (Evans, 1993) and this may be an insufficient duration for a clear and reliable admission to be made.

This is also arguably an insufficient duration for the caution to be adequately explained and efforts made to ensure that a young person understands it, as well as explain the roles of other participants such as the Appropriate Adult and legal advisor (if present). Surprisingly, despite the central importance of the police interview with young people, there is no identifiable recent study since Evans’ 1993 research of interview duration times for young people in England and Wales, and there is no collation of these statistics by the Youth Justice Board or other government body.

The court has on occasion severely criticised the conduct of police when interviewing young people, and in *R. (on the application of M) v*

Leicestershire Constabulary [2009] EWHC 3640 (Admin)) the court was especially critical when quashing the Final Warning issued to M, as not only had he had not made a clear and reliable admission, he had been subjected to unduly aggressive and oppressive questioning during his police interview, despite the presence of a legal representative.

The court in that case was particularly critical of the fact that the interviewing officer had set out a number of different propositions in one question, persisted with a series of leading questions and was not prepared to accept any of M's answers as possibly truthful. When quashing the Final Warning the court reminded decision makers that the PACE Codes of Practice (Notes for Guidance 11C) recognised that young people may make unreliable admissions if put under pressure or asked questions in a confusing manner.

Evans also similarly found in his research:

> 'examples of oppressive questioning…on occasion juveniles are harangued, belittled or directly and indirectly threatened that they will not be left alone until the police either obtain irrefutable evidence or the suspect confesses' (Evans, 1993:46).

It is an uncontroversial proposition that the quality of answers given by a young person is ordinarily subject to the quality of questions put to them, as well as the demeanour and conduct of the interviewing officer, or officers. A 'clear and reliable' or 'clear and unambiguous' admission is simply unlikely when questions put to a young person are 'rambling,

repetitious, and insufficiently focused on the main issues' (Evans, 1996: 107).

It also doubtful whether a formal police interview is even necessary for young people who are suspected of committing a low level offence. There is common law precedent that an admission for the purposes of a police caution must only be obtained during a formal police interview, and the court in *Sharkey v Chief Constable of Merseyside* [2004] EWHC 2784 at 2784 held that although it was preferable that an admission for the purposes of a caution was obtained during a formal interview:

> 'If, for example, a solicitor indicated to the police that his client admitted the offence, it might, depending on the facts, be unnecessary to confirm the admission in a formal taped interview under caution' (2784).

The YCC admission criterion similarly does not require an admission during a police interview, and there are now both statutory and common law precedents which re-define the necessity of the police interview in some circumstances. If applied universally, this has considerable value in sparing young people from the rigours of a police interview, may prevent detention in police custody or at least lessen the duration.

Despite the potential advantages of not interviewing young people who are alleged to have committed a low level offence whilst under caution and subject to a PACE compliant interview, any erosion of a young person's

PACE rights should not be considered lightly, as there are inherent risks in any diminishment. Although:

> ‘one cannot be assured that the police always comply with PACE’ (Brookman and Pierpoint, 2003:459), and ‘lapses still occur’ (Pleasance, et al, 2011:3),

the dangers of questioning and interviewing of suspects outside of a police station are well known (Moston & Stephenson, 1993). As Kemp, et al warned:

> ‘within this new context of pre-charge decision making, the need to ensure the legal rights of children are properly protected within the early stages of the criminal justice process [are] more urgent’ (Kemp, et al, 2011:29).

There must however be a balance between the benefits and protections afforded by PACE, and the unnecessary arrest and detention of young people simply for the purpose of conducting a police interview. Further consideration should be given to processes which protect a young person’s rights but also afford them greater opportunities to make an admission, or have an opportunity to deny an alleged offence, as a volunteer outside of the custody environment.

Additionally, as Skinns (2008:22) identifies, the extension of the ‘police family’ through the introduction of police civilian interviewing officers and outsourcing of custody staff to the commercial sector (Police Reform Act

2002 and Serious Organised Crime and Police Act 2005; Her Majesty's Inspectorate of Constabulary, 2004), has resulted in a such a rapidly changing custody environment that it can be arguably characterised as 'Post PACE'. As such, the necessity for a formal PACE compliant interview should also be reconsidered.

Police interviews were traditionally carried out by police constables. The introduction of civilian interviewing officers however has had a significant impact on police interviews with young people. Introduced as an efficiency initiative intended to reduce bureaucratic burdens and redeploy experienced officers to frontline duties (Skinns, 2009:60), the task of interviewing young people for less serious matters is now routinely delegated to civilian interviewers, and experienced police officers are considerably less likely to be involved at all in interviewing young people.

6.19 Admissions and case summaries

The decision to offer an out of court disposal to a young person is no longer made by the constable on the street, or by an interviewing officer or Custody Sergeant, and these decisions are invariably made by those who have not met the relevant young person. Decisions are primarily made by designated police youth offending officers, and on occasion the CPS (Crown Prosecution Service, 2015c) but can extend to a multi-agency decision making process which also includes representatives of the Youth Offending Team, mental health specialists, social workers, housing officers, school representatives and any other relevant agency. As such,

decision makers are ordinarily entirely reliant on the summary of interview provided by the police; however, decision makers routinely do not listen to tape recordings of interviews in order to verify the accuracy of the police case summary (Evans, 1993; Sanders, 1997).

Despite the importance of ascertaining whether a 'clear and reliable' or 'clear and unambiguous' admission has been made, there is evidence that these summaries are often unreliable and inaccurate, and fail to:

> 'convey adequately the gist of what had been said at an interview' (Baldwin, 1992 5).

Although a failure to make an admission can unnecessarily lose a young person the opportunity for an out of court disposal, there is research which suggested police cautions were sometimes issued even when a denial is made or an equivocal account given. Evans' 1993 study of police interviews with juveniles found that 22% of case summaries which resulted in either a formal caution or informal warning recorded either a denial of the offence or an account which short of a full confession (Evans, 1993b:86).

There are no recent studies examining whether (or how many) young people are being issued with formal out of court disposals when the summary of their answers records either a denial or equivocal account, or erroneously records that an admission was made. Given this, in these circumstances a failure to make an admission may not necessarily be a barrier to an out of court disposal, though it is undesirable that out of court

disposals are issued in such circumstances – especially as a formal out of court disposal is in many senses commensurate with a conviction - and a young person who has denied an offence is denied the opportunity to challenge the evidence or put the Crown to proof.

Recent challenges by adults concerning cautions issued to them in error highlight the dangers of relying on police summaries of alleged admissions in interview. In *Caetano v Commissioner of Police for the Metropolis* [2013] EWHC 375 (Admin), an adult made an admission to slapping her partner twice in her police interview; however, this was in the context of considerable provocation and a history of suffering domestic violence at the hands of the 'victim', her partner.

The court found that the police officer who prepared the summary of Caetano's interview had overstated her account, and also, significantly, failed to adequately record the considerable mitigation presented by Caetano in her police interview. The caution was quashed as this inaccurate summary had resulted in the subsequently flawed decision of the Custody Sergeant to authorise a caution, having failed to adequately consider that it was not in the public interest for Caetano to receive a caution.

Given the increasing use of street interviews by the police, challenging either the failure to receive a diversionary disposal on the grounds an adequate admission had not been made, or had been issued in error for a similar reason, is also problematic. The answers any person provides in a

police interview are subject to legal constructions by the police, and when an interview has not been tape recorded the police summary of interview is often the only record of what account was provided by a suspect (Lee, 1981:77). The balance between sparing a young person the rigours of a formal police interview but accurately recording their answers and also ensuring their rights are protected is arguably far more complex than policy makers recognise.

6.20 Complexities of the understanding diversionary processes

Prior to the introduction of the enhanced admission criterion under the CDA, there was established common law precedent that a competent, well-educated adult may not fully understand the cautionary process; neither the CDA nor LASPO has made any allowance for the fact that a young person, especially the very young, may possess less competence or understanding than an adult. The Independent Commission on Youth Crime (2010) also identified inadequacies in information available to young people and their Appropriate Adults prior to a police interview concerning both the interview itself and criminal justice processes.

In *R v Commissioner of Police of the Metropolis* [1997] 1 W.L.R 1519 the court overturned a caution issued to an adult offender of ‘full age and capacity and not impaired by drink or drugs’ who accepted a caution whilst in custody, after reading and signing all relevant documentation. The adult successfully persuaded the court that he had not appreciated that by

signing the caution form he was admitting the commission of the offence, despite the form clearly setting this out.

Similarly, in *Farrell v Chief Constable of West Midlands* [2007] EWCH 3187 an adult, who admitted pushing another person off a chair after verbal provocation, successfully overturned a caution issued to her for the offence of common assault, on the grounds that although she had accepted the facts of the allegation, this was not an admission to any wrongdoing as she had believed she was acting lawfully as a consequence of the provocation. The court in this case had no difficulty in finding that simply because Farrell admitted that she had pushed someone this was not commensurate with a clear and reliable admission, and when she accepted the caution she did understand the distinction between an admission of a fact and an admission of offending.

Significantly, despite Farrell's adult age and the fact that she was a university student, the court was also satisfied that she had not sufficiently understood the cautionary process when she accepted the caution.

This case demonstrates that the consequences of accepting and understanding a formal police caution are not necessarily understood by competent adults, and that the information available to them prior to the acceptance of a caution can be insufficient. Stratton was an educated and competent adult who willingly signed a caution form which had been read to her prior to signing, and which stated:

> ‘I acknowledge I admit the offence(s) and agree to be cautioned. I understand that if, in the future, I should appear before a court and am found guilty of another offence, then details of this caution may be given to the court’ (paragraph 8).

Despite the ostensible clarity of this document, the court quashed the caution on the grounds that it did not adequately explain that acceptance of a caution may also have to be disclosed in circumstances outside of any criminal proceedings, and had potentially wider adverse consequences for any future employment or travel.

6.21 Legal advice and admissions

Certain practices and procedures concerning young people differ for the purposes of detention in custody and a police interview (PACE and Codes of Practice C), and indeed throughout the whole of the criminal justice system. The CPS accordingly developed its own accredited youth specialist lawyers (Crown Prosecution Service, 2015d). Remarkably, there is no such accreditation for police station representatives or solicitors who advise young people in police custody or represent them at court, despite concerns that this specialisation is necessary (Goldson, 2013a:6).

The quality of legal representation for young people, and also adults, has been the subject of considerable research, with often contradictory findings. Some research suggests defence solicitors are either ‘passive’ during the interview process, (Baldwin, 1994:73), ‘simply outmanoeuvred’

by the police (McConville, et al, 1991:167), remain silent 'when the situation seemed to cry out for them to intervene' (Baldwin, 1992:29); and routinely submit to an 'uncritical acceptance of the prosecution case' (McConville, et al, 1991:167-169). Other research suggests law firms routinely deploy inexperienced staff for less serious matters (Baldwin, 1992; Evans, 1993; McConville and Hodgson, 1993), which is indicative that young people who commit low level offences are likely to be in receipt of advice from those least experienced to provide it.

Clarke, et al, 2011 found however that the presence of solicitors is systematically associated with a reduced likelihood that young people will make an admission during questioning, and it is arguable some young people ordinarily eligible for diversion are prosecuted due to legal advice to exercise their right to silence in a police interview.

Skinns' similarly found that:

> 'it is equally possible that the higher chance of receiving a caution is *caused* by the lack of a lawyer' (Skinns, 2009a:408),

however, any analysis must make allowance for the possibility that legal advisors are properly identifying those cases where there is insufficient evidence and as such advising suspects to exercise their right to silence, and a proportion of those unrepresented suspects who make an admission and receive a caution have done so when there was insufficient evidence.

Almost all scholars have acknowledged the need for further research or greater analysis of existing practices concerning the role of legal advisors when young people do not make an admission and lose eligibility for an out of court disposal, however reasons may include a legal advisor not understanding an admission is a pre-requisite for diversion, or alternatively, misjudging the strength of the police evidence and mistakenly believing that no admission should be made due to inadequate evidence for a charge to be authorised.

There is however a considerable body of contradictory research which suggests there is a wide variance in: access to legal advice; the quality of legal advice provided; and the extent to which legal advisors on occasion facilitate admissions from young people in the absence of satisfactory evidence against them to support a realistic prospect of conviction, in order to benevolently spare them the rigours of formal court process (Steer, 1970; Evans, 1993; McConville and Hodgson, 1993; Evans, 1994; Morgan and Stephenson,1994; McConville et al, 1993; Brown, 1997; Sanders, 1997; Kemp et al, 2011). Other research suggests young people themselves may make admissions in the absence of evidence for similar reasons (Sanders, 1998; Hine, 2007).

There is also published guidance that legal advisors should advise a young person to exercise their right to silence for the sole reason they believe the young person is not mature enough to cope with a police interview (Ashford et al 2006:7.213), and this advice appears to give no

consideration to how this may preclude diversion. Quinn and Jackson's study (2007) also identified the police perception that certain firms in Northern Ireland had a policy of always advising suspects to exercise their right to silence.

The introduction of a fixed-fee system for legal advisors, which notably abolished payment of waiting time at the police station, resulting in legal advisors only eligible for payment when the police are ready to interview a suspect. This jeopardises the likelihood that legal advice will be given at an early stage in a suspect's period of detention as legal advisors are unlikely to attend until the interview stage (Kemp and Balmer, 2008; Skinns, 2009a; Skinns, 2011).

The recent implementation of a fixed fee payment structure for legal advice at the police station may however be advantageous for young people who commit low level offences, as:

> 'Police station cases are now on a fixed fee basis: providing a perverse incentive to lawyers to deal with quick, straightforward cases rather than more complicated and time consuming cases (Spiro and Bird, 2010: xiii),

and there is no financial incentive for experienced lawyers to be utilised for more serious cases.

Others suggest that there is historically a paucity of talent amongst criminal solicitors, as:

> ‘the great majority of practising lawyers prefer the fields of corporation law…not only do these fields generally bring far greater financial rewards; there is also the deplorable, but undeniable tendency to regard criminal law practice as carrying less social and professional prestige’ (Friedman, 1959:165).

The inadequacy of legal advice concerning cautioning was highlighted in *Caetano v Commissioner of Police for the Metropolis* [2013] EWHC 375 (Admin), where a highly educated adult suspect, but suffering from a history of domestic violence, mental health difficulties, and a language barrier as a consequence of English being her second language, accepted a police caution despite clear evidence that she had been the victim of domestic violence during the alleged incident, and the alleged victim, her partner, was not supportive of a prosecution. Caetano was represented throughout her police interview by the Duty Solicitor, who failed throughout the whole process to ‘intervene in any helpful way’ and gave advice to Caetano to accept a caution – this was held by some to be ‘indefensible’ (Leigh, 2013:269-270).

This case prompted commentators to highlight the perceived ‘shortcomings’ of legal advisors to ensure their client understands the significance of a caution (Leigh, 2013: 272) and the need for solicitors and accredited legal representatives to:

> ‘give robust advice and have a good knowledge of the consequences of a caution...this is a further reminder of the

> importance of ensuring that representation at the police station enjoys proper levels of quality and experience' (Ellis and Biggs, 2013:9).

A majority of police and civilian interviewers who participated in this research also held the view that the primary reason young people did not make an admission and unnecessarily lost the benefit of an out of court disposal was because of inadequate legal advice (Chapter 7.6). More experienced police officers were less likely however to hold this view though, and a majority of legal advisors felt that the primary cause was instead the inadequate pre-interview disclosure provided to them (Chapter 7.7).

What is incontrovertible though is that legal advice is a crucial determinant of the outcome for young people (Lamb and Sim, 2013), especially as the police interview is often the only opportunity to, when appropriate, admit an offence and gain eligibility for diversion. Any negative aspects of poor legal advice are no doubt outweighed by the known benefits of good legal advice and representation for young people in police custody (Brookman and Pierpoint, 2003; Cape, 2004; Skinns, 2009), and the complexities of advising young people should not be underestimated.

Determining whether to advise a young person to make an admission must also be considered in the context of the adversarial nature of the custody environment; the often anti-social hours in which legal advisors are expected to attend and advise; and a culture of suspicion that pre-

interview disclosure provided to them by the police is inadequate or unreliable. Legal advisors are also tasked with advising and obtaining instructions from often very young people with whom they have had no prior involvement with, and may have complex behavioural or intellectual difficulties; have had no previous experience of detention in custody; are distressed by the custody experience; are subject to the adversarial nature of the interview process; and are accompanied by hostile or distressed Appropriate Adults; (Evans, 1993; Department of Health, 2009; Talbot, 2010; Coleman et al, 2011).

6.22 Inadequate pre-interview disclosure and the 'no comment' interview

An often overlooked impediment to diversion is legal advice to a young person to answer 'no comment' in their police interview, as a consequence of inadequate disclosure of evidence prior to an interview by police, or during other stages in the police investigation. The court has repeatedly disapproved of police tactics to withhold disclosure to legal advisors, and held that an acceptance of a caution is inextricably linked to informed legal advice (*R v DPP Ex p. Lee* [1999] 2 ALL E.R. 737; *Wildman v DPP* [2001] EWHC ADMIN 14; *DPP v Ara* [2002] EWHC Admin 493).

There is a body of research which suggests defence legal representatives are consistently critical of the case information they receive from the police in order to advise their client prior to an interview (Bucke, et al, 2000), with one legal representative claiming:

> ‘one person’s disclosure could be written on the back of a postage stamp. Other people will give you reasonable disclosure’ (Quinn and Jackson, 2007:240).

Legal advisors are also warned by one eminent criminal defence expert that:

> ‘Any information that the officer gives concerning evidence against the suspect should be treated cautiously for a number of reasons. In some cases the information may be exaggerated in order to encourage the suspect to confess’ (Cape, 2011:4.58).

Consequently, some defence legal representatives deploy the ‘highly risky’ strategy of advising a young person not to say anything until more evidence is disclosed (Quinn and Jackson, 2007:240), and jeopardise an out of court disposal.

This scepticism is borne out given the guidance in Blackstone’s 2014 Handbook for Policing Students, where officers are advised when planning an interview to consider:

> ‘What is the evidence? What evidence should be disclosed immediately? What evidence shall be withheld (at least for the time being)? When will this evidence be disclosed in the interview process? Can withholding this evidence be justified?’ (Bryant and Bryant, 2014:497).

Evans (1993) and Quinn and Jackson (2007) further identified the need to recognise that the interactions between the parties prior to a police interview are relevant to what account, if any, a young person will give in their police interview, with the police ordinarily dominating what information is provided to a young person, their legal representative or Appropriate Adult.

In June 2014 significant changes to the PACE Codes of Practice C and H were implemented in order to comply with the provisions of EU Directive 2012/13/EU, which mandated that a suspect and their legal advisor are entitled to disclosure of adequate information prior to a police interview about the nature of the case against them, unless this disclosure might prejudice the investigation.

Although:

> ‘there is likely to be significant debate about the information which might prejudice a criminal investigation’ (Edwards, 2014:17),

these amendments to PACE may go some way to vitiate the risk that young people lose the benefit of a diversionary disposal for the sole reason that they exercised their right to silence as a consequence of inadequate pre-interview disclosure. Although it is perhaps ‘good for children to own up when they have done wrong’ (Lady Hale, *R v Durham Constabulary and another* [2005] UKHL 21), they should not be subjected to any formal criminal sanction when there is insufficient evidence against them for a realistic prospect of conviction.

The Law Society for England and Wales, having also identified the need for improved pre-interview police disclosure, recommended that:

> 'Whilst we acknowledge that there can be tactical advantages for the interviewer in withholding certain information from a suspect before interview, it is also undeniably true that poor or inadequate disclosure frequently leads to "no comment" interviews. In cases where the evidence is strong, especially in the form of CCTV evidence, early and full disclosure to the suspect is more likely to lead to admissions being made and guilty pleas following.
>
> There should therefore be a greater emphasis on the police making fuller disclosure of their case prior to interview, in order to shorten the interview process and to illicit more admissions and guilty pleas. Again, this would not require further legislation but is rather a training issue for the police' (Law Society for England and Wales, 2014: paragraph 14).

Despite the recommendations of the Law Society and the recent PACE amendments, LASPO and the YCC Guidelines (Ministry of Justice, 2013b) still presume that young people always have the benefit of adequate information concerning the evidence against them prior to their police interview - or alternatively assumes that if an offence has been committed then an admission should be made - and young people are always able to make informed decisions as to whether to make an admission to the police. Improving the quality of pre-interview disclosure will arguably

increase the likelihood that young people do not lose the opportunity to be considered for an out of court disposal for the sole reason that their legal advisor advised then to exercise their right to silence as they were not able to assess the strength of the evidence.

6.23 Admissions and inducement

There is however understandable reluctance by the police to discuss the possibility of diversion prior to an interview with a legal representative, Appropriate Adult or young person, as to do so raises the spectre of an allegation of inducement. There are significant anomalies between statutory guidance, common law, and the practicalities of implementing a Youth Caution, which place the police in an invidious position concerning a likely outcome prior to a police interview.

Paragraph 4.8 of the 2013 Guidance states that:

> ‘Young people and their parents/carers or other Appropriate Adults should have access to information about the options available, including Youth Cautions, so that they can make an informed decision before the question as to whether they admit the offence is put to them’ (Ministry of Justice, 2013h).

The courts however have strictly adhered to the principle that any admission on which the police rely must be made by a suspect before a decision to caution is made (*R (Thompson) v The Commissioner of the Metropolitan Police* [1997] W.L.R. 1519). Indeed, the Police Student

Handbook gives a ‘major warning’ (Bryant and Bryant, 2014:497) that an officer should never disclose an opinion on the likely outcome for a suspect prior to interview and this warning is applicable to all suspects in custody, including youths. The police thus face genuine difficulties complying with Paragraph 4.8, as to do so can expose them to allegations that they are improperly attempting to induce an admission.

Although it is entirely proper that an admission should not be induced under any circumstances, equally however, a young person and their Appropriate Adult are entitled to information at the earliest possible opportunity concerning the consequences if an admission is not made in a police interview. The fear of unfounded allegations of inducement is arguably material barrier to police providing useful and objective pre-interview information, and it is regrettable that LASPO and the YCC guidance do not provide further practical support to the police concerning the professional predicament they are often confronted with.

The primary research findings provide some corroboration for this view, with over half of civilian interviews and a third of less experienced police officers finding it difficult to provide an adequate explanation about the need to make an admission to gain eligibility for an out of court disposal, but not commensurately induce an admission (Chapter 7.8). It is also of significance that legal representatives expressed sympathy for the police concerning the complexity of explaining diversionary procedures without inducing an admission, and a majority recognised the police were unfairly

exposed to false allegations of inducement when explaining diversionary processes (Chapter 7.8).

6.24 Admissions and Appropriate Adults

PACE and the accompanying Codes of Practice introduced the role of the Appropriate Adult, however the ambiguous definition of this role, and concerns that parents are routinely incapable of adequately performing it, have been the subject of considerable criticism (Evans, 1993; Littlechild, 1998; Pierpoint 1999; Pierpoint, 2000; Pierpoint, 2006; Williams, 2000; Thomson et al, 2007; Criminal Justice Joint Inspection, 2011). It is conceivable that these inadequacies are a contributory factor when young people inexplicably fail to make an admission and unnecessarily lose the opportunity for a diversionary disposal.

The literature review suggested that parents acting as an Appropriate Adult are often unsure of their role, routinely make no contribution at all during police interviews, are incapable through their own vulnerabilities to fulfil their role, are not necessarily supportive of their child, and are occasionally even overtly hostile to them. Parents also routinely perceive their role is to assist the police and not their child, and have reported feelings of fear and disorientation by the custody experience, despite not technically being detained themselves (Evans, 1993; Dixon et al, 1990; Brown, 1997; Kemp et al, 2011).

The primary research undertaken for this thesis disclosed considerable divergence between the views of police officers/civilian interviewers and legal representatives as to who is best placed to act as an Appropriate Adult, and the competency and suitability of parents to perform this role. Police/civilian interviewers were considerably more positive about parents acting as Appropriate Adults, and believed that an admission was more likely if a parent was present - unless that parent had their own antecedent history which made a 'no comment' interview more likely. A majority of legal advisors however were contrarily highly critical of the ability of parents to competently act as Appropriate Adults, felt parents unduly influenced the answers a young person gave in their police interview, and held that YOS/Social Services were the most capable alternative to perform this role (Chapter 7.12 and Figure 2).

Although a parent should not be asked to act an Appropriate Adult if they are estranged from the young person being interviewed (*H and M v DPP* [1998] Crim LR 653, QBD), the court has upheld decisions to permit a parent to act as an Appropriate Adult against the express wishes of a young person in custody (*DPP v Blake* [1989] 1 W.L.R. 432). Though Code C Note for Guidance 1B of PACE has sought to remedy this, a young person still must 'expressly and specifically object' to their parent acting as their Appropriate Adult, and:

> ‘this will obviously be a difficult decision for a juvenile to make as it may provoke further repercussions after the juvenile’s release from custody’ (Ashford, et al, 2006:7.104),

and in practice many young people are unlikely to make such requests.

The fear some young people may have of admitting an offence in the presence of their parent should not be underestimated. This is especially relevant to those young people who inexplicably fail to make an admission in the face of strong evidence against them, and when diversion is seemingly in their best interests. The distress and anxiety that parents acting as Appropriate Adults have been found to experience when their child is in police custody or is being interviewed by the police (Evans, 1993; Medford et al, 2003; Ashford, et al, 2006:144) may be a contributory factor. It is also salient that parents retain the right to use lawful force as a measure of discipline (the law of ‘reasonable chastisement’ - Section 58 Children Act 2004 and Section 39 Criminal Justice Act 1988) yet are still considered suitably placed to act as an Appropriate Adult to support their child who is in police custody for alleged offending, and are liable to parental censure as well.

The 2002 Final Warning Scheme Guidance (Home Office, 2002:9.14) extended the role of the Appropriate Adult beyond detention and interview at the police station, to include mandatory presence when reprimands and Final Warnings were issued, and the 2013 Guidance is almost identical (para 9.13). There is no assistance however in either Guidance which sets

out what participation, if any, a parent may have in exploring the possibility of diversion with the police prior to an interview or at any stage thereafter.

Williams (2000) argues persuasively that the supportive role of the parent as an Appropriate Adult which was established by PACE was later compromised by the CDA, which re-defined the parent as an authority figure in order to enhance the seriousness of reprimands and Final Warnings, and parents were expected to successfully undertake these contradictory roles. The role of the Appropriate Adult under LASPO and the YCC Guidance appears identical and equally relevant to Williams' critique.

The introduction of Parenting Orders in s.8 of the CDA (Stone, 2003), which places a parent under a court order for up to 12 months with the possibility of criminal sanctions for non-compliance, further compromises the supportive role of the parent as an Appropriate Adult at the police station. A parent may have a direct personal interest in any police investigation, which is in conflict with their role to protect the interests of their child as an Appropriate Adult (Burney and Gelsthorpe, 2008). This raises the possibility that the answers given in police interviews may on occasion reflect the best interest of the parent, and not the young person, and young people may be making admissions in the absence of sufficient evidence in order to secure an out of court disposal, so that their parent is not exposed to the risks of an order of the court against them, such as

Compensation Orders, Fines, Victim Impact Surcharges, Parenting Orders and associated sanctions.

6.25 Race, admissions and diversion

It is well recognised that historically BME youths are less likely to receive a formal out of court disposal than their white counterparts, and also enter the criminal justice system at a disproportionately higher rate (Landau and Nathan, 1983; Fitzgerald, 1993; Smith, 1997; Feilzer and Hood, 2004; May, et al, 2010; Young, 2010; Office for Criminal Justice Reform, 2010; Independent Commission on Youth Crime and Anti-Social Behaviour, 2010; Youth Justice Board, 2010; Smith, 2014**.**

Despite the recent fall in the proportion of out of court disposals issued as a direct alternative to formal prosecutions, BME adults and juveniles are still:

> ‘less likely to receive an out of court disposal for an indictable offence, and more likely to be proceeded against at magistrates’ court, than all other ethnic groups (Ministry of Justice, 2013f:13),

and

> ‘In 2011 per 1000 population aged ten or older, there was a higher rate of Black First Time Entrants (8.2) compared with White (3.6), Asian (4.3) and Other (4.4) FTEs’ (Ministry of Justice, 2013f:62).

The mandatory admission criterion necessitates that all young people must constructively engage with the police in order to gain eligibility for an out of court disposal, and this engagement ordinarily takes place during a police interview. There is however evidence which suggests BME (black minority ethnic) young people, predominantly males, are less likely than their white counterparts to make an admission to the police. The admission criterion is arguably a central contributor to the disproportionate entry of some young BME people into the formal criminal justice system, yet grossly recognised as such.

Most studies analysing the disproportionate entry of BME people into the youth justice system found no evidence of a greater offending propensity or any evidence of overt racism in decision-making processes (Hood, 1992; Mhalanga, 1997: Smith, 1997; Barclay, et al, 2005; Bishop, et al, 2010). Reasons are instead variously believed to include the consequential 'multiplier effect' (Lord Justice Taylor quoted in Goldson and Chigwada-Bailey, 1999:63) of interrelated social and criminal justice factors (Ashford et al, 2006:1.29) such as:

i. social and educational exclusion;
ii. feelings of victimisation, powerlessness, a belief by BME youths that they are treated less favourably than white people and the same standard of procedural fairness is not administered to them;

iii. pervasive targeted policing of perceived crime ‘hotspots’ areas which have a greater number of BME residents;

iv. police racial hostility;

v. disproportionate use of ‘sus’ laws and PACE ‘stop and search’ powers and arrests;

vi. reduced likelihood of requests for legal advice being met;

vii. disproportionate police and CPS decisions to prosecute weak cases (Jefferson and Walker, 1993; McPherson, 1999; Yolander, et al, 2000; Bowling and Phillips, 2002; Cox, 2002; Antonopoulos, 2003; Ball, 2004; Barclay, et al, 2005; Well, 2007; May, et al, 2010; Independent Commission on Youth Crime and Anti-Social Behaviour, 2010).

One recent study (May, et al 2010) attempted to identify discriminatory and differential treatment in the youth justice system. Although the authors found that BME youths were less likely to receive a caution than their white counterparts, and they measured extensive factors such as offence seriousness, age and antecedents, their model does not appear to have factored into their analysis those young people who would technically been eligible for a reprimand or Final Warning, but were charged and put before the court because they failed to make an admission. The absence of any data which records admissions may account for this omission.

Although by 1990 the Home Office had acknowledged that young BME people were less likely to receive a police caution than their white

counterparts (Home Office, 1990), as far back as the 1980s, grass root movements such as the Sheffield Black Justice Project had established a 'help on arrest scheme' to support and advise young BME people in police custody, having identified locally the failure of this cohort to make admissions as the primary reason for their early entry into the criminal justice system (Woodhill and Senior, 1993).

Phillips and Brown (1998) and The Commission for Racial Equality (1992) also identified that differences in prosecution rates between youth racial groups were influenced not solely by the nature and seriousness of the offence or evidence available to support a realistic prospect of conviction, but also in part by admission rates; and the failure of BME youths to make admissions in police interviews was a contributing factor in their overrepresentation in the criminal justice system.

Explanations as to why young BME people are less likely than white youths to make admissions in police interviews are complex. However, the relationship between young black people and the police is known to be characterised by feelings on the part of the former of victimisation, police racism, powerlessness, and a belief that they are treated less favourably than white people (Scarman, 1981; McPherson, 1999; Dingwall and Harding, 1998; Bowling and Phillips, 2006; Gervais, 2008; Youth Justice Board, 2010).

The routine practice of arrest, detention in custody and police interview under caution as a means of securing an admission, in combination with

perceptions of racist mistreatment during these processes, may further explain in part why young BME people are less likely than other groups to engage with police during the interview stage and make an admission (Wilson, 2006).

Although there has been greater effort to monitor and record race and outcomes in the criminal justice system (House of Commons Home Affairs Committee, 2007; Ministry of Justice, 2013f), there is a lamentable absence of data and statistical analysis concerning how many young black people are forfeiting eligibility for an out of court disposal for the sole reason that they failed to make an admission. It is thus not known whether this differential is no more than a disparity between young BME people and their white counterparts outside of discriminatory practices, or the mandatory admission criterion is in fact part of an inherently discriminatory process.

Forms of discrimination within criminal justice processes fall within at least 6 identifiable types, namely categorical, statistical, interactional, situational and institutionalised (see Reiner, 2010:160-162). The admission criterion arguably falls within the latter two categories, as a consequence of a universally framed policy and procedure which is unwittingly discriminatory (Scarman, 1981:2.2.2; Reiner, 2010). This distinction is critical for any future policy initiatives concerning whether an admission should remain a necessary pre-requisite to a diversionary disposal (Bishop, et al, 2010; Bilchick, 1999).

Although the Youth Justice Board mandated that by 2005:

> 'All YOTs should have an action plan in place to ensure that any difference between the ethnic composition of offenders in all pre-court and post-court disposals and the ethnic composition of the local community is reduced year on year' (Youth Justice Board, 2010:29),

this has seemingly failed to extend to any data collection of admission rates of white, BME and other ethnic young people to assess these known differentials, or resulted in the implementation of any action plans. The Youth Justice Board's accomplishments concerning reducing the disproportionate out of court disposal outcomes between white and BME youths has been 'limited' in breadth (Smith 2014a:151). Recent statistics suggest this differential may in fact have worsened (Youth Justice Board, 2015:28) and this target has seemingly been removed (Youth Justice Board, 2014b).

The absence of reliable data concerning how many young BME people are refused an out of court disposal for the exclusive reason that they failed to make an admission is also arguably contrary to statutory obligations imposed on other public bodies, including the police and Crown Prosecution Service, to undertake ethnic monitoring of procedures and outcomes in accordance with s.95 of the Criminal Justice Act 1991. It is possibly also inconsistent with anti-discrimination principles set out in sections 9 and 13 of the Equality Act 2010 and obligations imposed by the

Equality and Human Rights Commission (EHRC) to identify to monitor the law on equality and human rights (EHRC, 2014:6.1.1).

Despite the known variances in the cautioning rates between young BME people and other racial groups and some attempts at progressive reform, these disparities continue (May, et al, 2010; Smith, 2014) and there has been inadequate consideration as to whether the mandatory admission criterion is inexorably disadvantageous to black youths. This is especially salient given the Home Office continues to claim, perhaps disingenuously, that it cannot account for the overrepresentation of young BME people in the criminal justice system because:

> 'The complexity of the relationship between race, ethnicity and crime and the lack of reliable data, we are unable to say with confidence whether people are being treated differently by the system because of their ethnic groups or why disproportionality occurs' (House of Commons Home Affairs Committee, 2007:29).

Despite the absence of a comprehensive body of statistical data, there is still sufficient material available to positively assert that the mandatory admission criterion is a significant contributor the disproportionate and unnecessary entry into the formal criminal justice system of young BME people. This thesis seeks to highlight the need however for inclusion of this cohort in wider statistical collation, as well as the desirability of further research and exploration as to whether the admission criterion is an inherently discriminatory statutory requirement.

Consideration should also be given to whether there is benefit in extending the radically different YCC criterion, which does not require any admission by a young person in a formal police interview, to Youth Cautions. Although an admission is still required for the issuing of a Youth Caution, there is no requirement that it be made in a police interview at all, and it necessary only at the point of issue (Ministry of Justice, 2013b).

By vitiating the need for a young person to participate in a police interview, the YCC criterion significantly lessens the level of engagement usually necessary in order to secure eligibility for an out of court disposal. This reduces the potential for disadvantage for young BME people given the known complexities between BME youths and the police, and their traditional unwillingness to participate in a police interview or make an admission.

The primary research undertaken for this thesis with relevant professionals concerning admissions and race found that very few police officers and civilian interviewers believed that race was of relevance concerning whether a young person made an admission. This was significantly less than legal representative responses, of whom approximately half felt that race was sometimes an issue (Chapter 7.11), with BME youths less likely to make an admission than their white peers. A very small number of respondents also identified Asian girls as occasionally reluctant to make an admission for cultural reasons commensurate with ‘izzat’ and notions of family honour (Chapter 7.11).

6.26 Admissions and the fear of ‘grassing’

Young people, irrespective of race, are far more likely than adults to report negative attitudes towards the police (Hurst and Frank, 2000) and can throughout adolescence have a conflictual relationship with the police and other authority figures (Hinds, 2007; Hinds, 2008). The admission criterion compels engagement with the police if diversion is to be secured, and affords no recognition for how difficult this may be for many young people simply as an ordinary consequence of their adolescence.

It can also be the perception of many young people that answering police questions in an interview, or any other positive engagement with the police, exposes them to allegations of being a ‘grass’ (Evans et al, 1996) or a ‘snitch; (Clayman and Skinns, 2011), and:

> ‘not grassing is a way of protecting the collective loyalties upon which youthful strategies for safety rest’ (Loader, 1996:74).

Research which examined the issue of ‘grassing’ on an inner city housing estate in the 1990s found that a powerful ‘moral code’ and ’neighbourhood dogma’ created the ‘no grass rule’ (Evans et al, 1996). Fear of being labelled a ‘grass’ was has further been found to carry risks both physically and socially as it jeopardises the networks of trust embedded on the estate (Yates, 2006) and another study found this fear was particularly acute amongst young people (Cohen, 1981).

This fear of ‘grassing’ may be further compounded given the evidence that adolescent friendships and peer influence are a key determinant in adolescent offending (Smith and Ecob, 2013; Beier, 2014), and it is likely that a young person who has offended, irrespective of their ethnicity, has not offended on his or her own but with others of a similar age (Sharp, et al, 2005; Smith and Bradshaw 2005) and young people are more often than adults faced with the fear that any admission they make may inculpate another. This may explain why on occasion explain a reluctance to make an admission to secure an out of court disposal which would ordinarily be advantageous.

Other factors which contributed to the reluctance of young people to positively engage with the police, or to ‘snitch or not to snitch’, included wider social influences including those of family, elders or ‘olders’ within their community and peer group, contemporary music (Clayman and Skinns, 2012:460), and previous negative experience of informal and contact with the police (Hinds, 2008)

Although positive engagement between the police and young people should be encouraged, LASPO fails to recognise that:

> ‘The relationship between adolescents’ offending and the delinquent behaviour of their peer group is one of the best established facts in criminology’ (Akers, 2014:73; see also Akers, 1998; Warr, 2007),

and some young people may fail to make an admission due to their conflictual relationship with the police as authority figures, other cultural fears that making admissions exposes them to labelling as a ‘grass’, or ‘snitch’, and the fear that an admission will implicate a co-suspect.

It is plausible that the admission criterion as a precondition for diversion is in practical terms too onerous for some young people, and may account for why some young people inexplicably fail to make an admission. An expansion of the YCC criterion may be of additional benefit to young people who offend and who wish to secure a formal out of court disposal, but do not wish to name co-suspects or be considered a grass if they make an admission. Unlike a traditional police interview where it is likely that questioning will seek to secure the identity of other offenders, the YCC criterion does not require an admission in a police interview and ostensibly only requires an admission as an administrative paper exercise, thus significantly reducing engagement with the police and the associated risk of this engagement.

May, et al, 2010 additionally found that there was an increasingly adversarial style of police engagement with young people, which was resulting in hostile and adverse responses from this cohort towards the police. The Report of the Independent Police Commission found evidence of adversarial approaches to policing, which:

> ‘seem[s] almost purpose-built to exacerbate young people’s sense of disaffection by demonstrating their powerlessness and inability to

> command respect from authority' (Report of the Independent Police Commission, 2012:48),

and that:

> 'the deteriorating relationship between the police and young people, and those from ethnic minorities must be improved (2012:48).

The removal of the need for an admission in a formal police interview lessens to some extent the adversarial nature of police/youth engagement, and may better improve these relationships. It may also reduce the number of young people unnecessarily losing eligibility for an out of court disposal for the sole reason that they did not make an admission because of their negative perception of and relationship with the police.

6.27 Admissions and restorative justice

The CDA and Final Warning Scheme and its successor, LASPO, both promote and encourage the incorporation of 'restorative processes' into the youth justice system (Home Office, 2002:9.22; Ministry of Justice, 2010b;78). Out of court disposals are thus expected to incorporate these processes wherever possible (Evans and Puech, 2001; Van Ness, et al, 2001; Braithwaite, 2003; Ministry of Justice, 2010b), though there is 'post-code lottery' concerning how restorative justice operates throughout England and Wales (Criminal Justice Joint Inspection, 2012:17).

There is no statutory definition of what a restorative process should be, however there is ordinarily a core assumption that for restorative justice to

be successful, an offender is either before, during or at the conclusion of these processes willing to admit to some wrongdoing, either explicitly or implicitly, or take responsibility for their actions, or acknowledge the adverse consequences of their offending on the victim and wider community (Zehr, 2002; Johnstone, 2012: Zehr and Toews, 2004; Newbury, 2011).

For the purposes of determining whether a restorative process may be a suitable alternative to a formal sanction such as a Youth Caution or YCC, there is no statutory definition of what admission, acknowledgement, or recognition of wrongdoing is necessary from a young person. The absence of this statutory definition arguably affords decision makers greater flexibility in pursuing a restorative disposal, as they are not constrained by the rigid statutory definitions under LASPO and the YCC Guidelines.

This does however expose restorative processes to unregulated sub-judicial decision making, where discriminatory biases may go unsupervised or regulated (von Hirsch, et al, 2003; Eliarts and Dumortier, 2003; Padfield, et al, 2012), though some research into the procedural fairness of restorative conferencing found it operated to a high standard and had a high level of victim and offender satisfaction with procedural fairness (Crawford and Newburn, 2003; Barnes, et al, 2015; Scheuerman and Keith, 2015; see also Johnstone, 2011:25-27). Proponents of restorative justice also argue that community centred resolutions intentionally eschew state regulation and processes:

> ‘in order to empower communities to resolve their own disputes and keep their own order’ (Johnstone, 2012:115),

and though this empowerment is inevitably highly discretionary, this is not inevitably commensurate procedural unfairness (Schiff, 2007).

ACPO established national guidelines to assist police forces in introducing and managing restorative justice processes, and set out a number of mandatory minimum standards. Significantly, it rejected the traditional requirement that an offender make an admission, and instead requires the considerably less complex, and arguably less onerous criterion that:

> ‘the offender must take responsibility’ (ACPOa, 2012: 2.1).

Other jurisdictions which formalised restorative diversionary processes have responded to the almost inevitable variance of facts between victims and young people accused of offending by removing the need for any formal admission to be made in order for a Youth Conference to take place. In New Zealand, for example, which shunned the punitive turn in youth justice in England and Wales during the same period (Lynch, 2012), introduced the uniquely progressive diversionary Family Group Conference (FGC).

Premised on indigenous Maori justice traditions (Daly and Immarigeon, 1998; Maxwell and Morris, 2010) FGCs do not require an admission before a young person suspected of committing an offence can participate, and there is the simpler requirement that by the conclusion of

the FGC a young person 'accept(s) responsibility for their behaviour' (Children, Young Persons and Their Families Act, 1989: Section 4(f)(i)).

The considerable value of this lower test is that it recognises that young people as a consequence simply of their young age often minimise their culpability, and this is not necessarily commensurate with a wilful attempt to deceive. It is often only after a young person has engaged in restorative processes that they satisfactorily understand and are able to acknowledge their culpability or remorse (Scheuerman and Keith, 2015). However, the admission criterion under the CDA and now LASPO requires a clear and reliable admission to all elements of the offence at a very early stage in proceedings. Despite promoting restorative processes, the current statutory criterion gives no weight to these dynamics and is in conflict with the central purpose of restorative justice, which is to:

> 'engage with offenders to try and bring home the consequences of their actions and [to give them] an appreciation of the impact they have had on the victim(s) of their offences' (Dignan, 1999:48).

The risk of re-victimisation however during restorative processes should not be unrecognised, and given:

> 'the worrying statistic that one in five victims left the… [restorative justice conference] upset by what the offender and the offender's supporters had said' (Green, 2007; see also Dignan, 2005; Newbury, 2011),

it is perhaps not unreasonable that an offender accepts a victim's version of facts by making a satisfactory admission to all elements of the offence prior to any restorative engagement with the victim, and in this sense the statutory regime perhaps best protects victims from restorative processes where an offender has accepted only partial culpability.

Restorative processes however do not always afford young people a more flexible opportunity to take responsibility for their behaviour. An assessment of restorative processes in Northern Ireland, which introduced Youth Conferencing as a diversionary model under the Justice (Northern Ireland Act) 2002, highlights the complexities of requiring a satisfactory admission for the purposes of a Youth Conference, and the possibility that they perversely require a higher standard of admission from a young person that the Youth Court.

Though the Evaluation was predominantly positive, it identified a number of Youth Conferences which were terminated due to the failure of young people to make a satisfactory admission (Northern Ireland Office, 2006:63) and cites the unsuccessful Youth Conference of one young person, Ainslee (not his real name) who had allegedly committed the offence of common assault by beating, contrary to section 39 of the Criminal Justice Act 1998.

It was alleged during the conference that the victim claimed Ainslee had kicked them three times and spat in their face. At the conference, which (remarkably) took place almost a year after the incident, Ainslee accepted

he kicked the complainant once, but vigorously denied the other alleged violent acts. When it was put to Ainslee that he already signed a document accepting the prosecution version of the facts, he maintained he believed he had signed the document on the understanding that he was admitting that he had kicked the victim only once. The Youth Conference was eventually terminated as Ainslee withdrew his consent to participate further after he was continually challenged about his culpability.

The Evaluation endeavoured to explain the complicated status of disputed admissions and concluded that for a successful Youth Conference:

> 'While in legal terms it is not necessary for the young person to share participant's views on the surrounding facts…the young person must consent to the legal elements that make up the offence' (Northern Ireland Office, 2006:64).

This explanation highlights the complicated relationship between a satisfactory admission and satisfactory engagement for the purposes of diversion by way of a Youth Conference. Ainslee's acceptance of one kick was in law an admission to the offence of common assault by beating, and he was willing to participate in a restorative meeting over a year after the offence. There was no dispute at all concerning the legal elements of this offence and the divergence was simply concerning how many kicks he had inflicted and whether he spat at the victim.

On a practical level, had Ainslee simply been charged with the offence and put before the Youth Court from the start, his admission to one kick would

have most likely resulted in Ainslee entering a guilty plea, and the Youth Court would have proceeded to consider whether a Newton Hearing (a hearing of fact to determine whether the defendant should be sentenced on the complainant or defendant's version) was necessary.

Given the broad sentencing powers of the Youth Court, it is likely the Youth Court would not have required a Newton Hearing, and would have proceeded to sentence Ainslee on his own version of the facts. Given this, the Youth Conference arguably required a higher standard of admission from Ainslee than the Youth Court. This particular Youth Conference appeared to be highly adversarial and seemingly little different from a voluntary police interview, with the co-ordinator and police officer insisting Ainslee was not giving a truthful account and he should admit that the victim's account was the certain truth.

The fact that Ainslee was prohibited from having legal representation during this seemingly adversarial process raises the question as to whether there was an acceptable equality of arms, and additionally whether the Youth Conference was compliant with acceptable standards of procedural fairness and due process (Article 6, ECHR). Given this, the PACE and statutory diversionary procedures in England and Wales may arguably better ensure the equality of arms for young people than some alternative restorative processes.

Similar other research found that:

> ‘A number of the conferencing outcomes were less than positive… In some of these cases, the conferencing experience might have simply had no impact at all. In others, however, the young person’s self-reported conferencing experiences were so negative that they might have exacerbated…problems through either labelling or provoking defiance…several interviewees…felt that they were being expected to accept complete blame and responsibility for the crime…This insistence that the offender be held entirely responsible for criminal conflicts appears to further their sense of resentment and anger’ (Maruna, et al, 2007:3).

Although restorative justice processes in New Zealand have been ‘lauded’ as a model of best practice (Lynch, 2008:215), and this thesis has examined only a very small number of unsuccessful Youth Conferences, they do still highlight the complexities of requiring an admission from young people outside of a rigid statutory criterion, and the tensions between the aspirations and the reality of restorative justice (Newbury, 2011) may be better resolved by reconsidering what standard of admission or recognition of guilt is required, and at what stage of the process.

6.28 Admissions and other jurisdictions

The diversion of young people who offend from formal prosecution is enacted in domestic legislation of most common law and western jurisdictions, however not all require a young person who has offended to

make a clear and reliable admission to all elements of the offence at the earliest opportunity.

Canada and the Republic of Ireland do not require a clear and reliable admission but an alternative and less rigorous ‘acceptance of responsibility’ from a young person in order to gain eligibility for an out of court disposal, (Section 10(2)(e) Youth Criminal Justice Act 2002, Canada; Section 18 Children Act 2000, Ireland). This test, similar to the criterion used in the New Zealand Family Conference model, is considerably more accommodating of the known complexities and variances in how and when young people begin to understand right from wrong (Fortin, 2009:686) than the requirement in England and Wales that a young person makes a clear and reliable admission to all elements of the offence, and also demonstrates early frankness. LASPO however requires an admission from a young person irrespective of the gravity of the offence, and young people risk losing an out of court disposal if they fail to make an admission for petty and minor offences.

An overwhelming majority of respondents who participated in the primary research for this thesis expressed enthusiasm for a less rigid admission criterion similar to the Canadian model (Chapter 7.17) and considered it an appropriate substitute for the existing statutory admission criterion. Analysis of current diversionary practices operating by the police and civilian interviewer respondents also suggests they routinely substitute the rigid statutory admission criterion with a more flexible and discretionary

model which similarly seeks only an expression of remorse or contrition (Chapter 8.6).

6.29 The advantages of the admission criterion

Abandoning entirely the admission criterion as a gateway to diversion would be controversial. It has traditionally been the prevalent view that it 'good for children to own up when they have done wrong' (Lady Hale, *R v Durham Constabulary and another ex parte R* [2005] UKHL 21, and reoffending is less likely when a young person understands or acknowledges their wrongdoing through 'shame management', or the invocation of moral regret (Braithwaite and Braithwaite, 2001; Harris, 2006).

Imposing certain obligations on young people, such as requiring them to admit to wrongdoing, is also considered by some to enhance their 'autonomy and citizenship' (Hollingsworth, 2012:255) and is an important 'temporal aspect of responsibility' within criminal justice processes (Honore, 1999; Cane, 2002; Hollingsworth, 2007:194).

In practical terms, the absence of an admission criterion risks obfuscating and slowing decision making processes concerning whether a young person is eligible for an out of court disposal, as unless a denial is made in a police interview, decision makers will not know whether a young person is willing to accept an out of court disposal. This is contrary to recurrent policy initiatives to expedite youth justice processes (Home Office, 2006a;

Ministry of Justice, 2013:2.3). Removing the need for an admission by a young person may in certain cases also burden the police with unnecessary evidence gathering, such as obtaining additional witness statements, CCTV or forensic evidence, as there must still be sufficient evidence for a realistic prospect of a conviction for an out of court disposal to be issued, and in many cases it is primarily an early admission which satisfies this evidential prerequisite.

Any package of intervention attached to a diversionary disposal may also be difficult to successfully implement in the absence of a young person accepting some wrongdoing. Similarly, a failure or refusal to admit an offence may be in conflict with the principles of restorative justice, where a core tenet is an offender is willing to admit wrongdoing, either explicitly or implicitly (Zehr, 2002; Newbury, 2011). This is particularly important given restorative justice is intended to be an important feature of diversion for young people in suitable cases (Ministry of Justice, 2010a:67) and is incorporated into statutory guidance for Youth Cautions and YCCs (Ministry of Justice, 2013h:9.16; Ministry of Justice, 2013b Code for Youth Conditional Cautions:12.2).

It is also conceivably an expansion of the YCC criterion, which does not require an admission in a police interview, may encourage greater use of ‘no comment’ answers by young people, and a precedent against constructive engagement between young people and the police is established.

6.30 Admissions and Street Bail

Section 4 of Criminal Justice Act 2003 (as amended ss.30A to 30D of PACE) extended the existing practice of 'street bail' which empowers police to bail a suspect immediately after arrest to attend a police station at a later date. These statutory provisions confer substantial discretion to police officers to deal with young people who commit low level offences in this manner, and most of this cohort would likely satisfy this criterion given the unlikelihood that there is any immediacy in securing their detention.

The extension of street bail provisions was envisaged as having considerable advantages for parents intending to act as Appropriate Adults, affording them the opportunity to prepare and seek early legal advice should they wish to do so. It was also anticipated that greater use of police bail would increase the number of interviews taking place at a more suitable time for young people, who are often disadvantaged when interviewed during unsociable hours (Thomas & Hucklesby, 2003). The police and civilian respondents who participated in the primary research for this thesis were overwhelmingly in favour of greater use of street bail, on the grounds that it had the potential to keep greater numbers of young people out of the custody suite and also improve the likelihood of a diversionary disposal (Chapter 7.13).

Criticisms of street bail were considerable however (McPherson, 1999; Sanders and Young, 2002; Bowling and Phillips, 2006; Cape and Richards, 2010), including fears it would be used where there was little or

no evidence as an instrument of police authority; used discriminately to the detriment of minority ethnic groups, comparable with police use of stop and search powers; erode protections afforded to suspects through PACE and the role of the Custody Sergeant in reviewing grounds of an arrest; have a net widening effect where but for street bail provisions suspects would otherwise not have been arrested at all; and have an unsatisfactory absence of safeguards to ensure that young people who were subject to street bail would inform their parent of guardian of their arrest. Hucklesby (2004), in a scathing critique of extending street bail provisions, argued it ill thought out and misconceived, and a potential reduction in bureaucracy at the expense of the safeguards of a suspect's rights. More recently, Cape has argued that all use of street bail is neither proportionate or necessary, and consideration should be given to its abolishment (Cape, 2016).

The majority of legal representatives who participated in the research were supportive in principle of street bail, but were concerned that this unduly increased police discretionary powers, and could prevent access to legal advice and assistance (Chapter 7.13).

Although these are all legitimate concerns, they perhaps fail to give adequate weight to the benefits of street bail in suitable circumstances for young people. If it is to remain the practice that most youths have only one opportunity to make an admission, that being whilst under arrest, detained in custody and interviewed under caution, then the requirement for 'early

frankness' is perhaps best met by allowing them an opportunity prior to detention, when appropriate, to seek legal advice, prepare for an interview, negotiate if possible for an interview to take place at a reasonable time and be best placed to make an informed decision as to what account, if any, to give when interviewed.

This is especially salient given research has consistently found that suspects are more likely to waive their right to legal advice because of concerns that it will extend their period of detention (Phillips and Brown 1998; Skinns, 2009; Skinns, 2009a). Additionally, there is the inevitable momentum in any criminal investigation once a suspect is booked into custody, and although street bail by its nature involves a suspect being bailed to attend a police station at a subsequent date, it offers some opportunity for alternative courses of action. As Field found in his study of the decision making process:

> 'Although the general view was that there was still discretion for an experienced patrol officer to take a young person home to their parents even where an offence had been clearly committed if it was considered too minor to warrant official action…officers felt that the 'informal caution' was now rarely if ever an option once the young person had reached the custody suite' (Field, 2008:181).

7.0 CHAPTER SEVEN: THEMATIC ANALYSIS AND THE VIEWS OF STAKEHOLDERS IN CONTEXT OF THE RESEARCH QUESTIONS

7.1 What existing knowledge is there concerning the admission criterion within diversionary practices?

Despite the admission criterion being a central tenet of diversionary processes in England and Wales, the original analysis of existing literature identified that there was seemingly almost no academic or government-led research which examined this issue. There is also currently no statistical collation or analysis by the police, Youth Justice Board, or any other interested body as to how many young people make admissions to the police - either in a formal or a contemporaneous police interview. Additionally, there is no collation of any statistics as to whether young people lose eligibility for a diversionary disposal for the sole reason that they do not make an admission, and if so how often this happens and for what reasons.

This is consistent with the paucity of other research concerning young peoples' overall experiences of diversionary processes, including their understanding of diversionary procedures, and the relevance or otherwise of their experience of arrest, detention and interview in police custody, quality of legal advice they receive, the increasing use of interviews outside of the custody suite and the resultant diminution of young peoples' protections under PACE during diversionary processes (Sanders, et al, 1989; Bridges and Sanders, 1990; Brookman and Pierpoint, 2003; Skinns, 2009a, 2009b; Pleasance, et al, 2011).

7.2 Is there any need to study the admission criterion within youth justice diversionary processes?

Although it has long been enshrined in English law that not every misdemeanour must be formally sanctioned within the parameters of the formal criminal justice system (Sharpe, et al, 1980; Ashworth, 1998; Dingwall and Harding, 1998), from the early twentieth century it is apparent that minor transgressions committed by young people became progressively formalised (Steer, 1970). Concomitantly, but seemingly without rationale or debate, the admission criterion developed within diversionary youth justice practices as a mandatory pre-requisite for a diversionary disposal, even for low level offences or where it was in a young person's best interests to spare them the rigours of a formal prosecution and appearance at the Youth Court.

The significance of the mandatory admission criterion as a gateway or barrier to an out of court disposal has been grossly neglected, especially as the relationship between net-widening and the mandatory admission criterion is arguably co-existent. Many diversionary initiatives throughout the nineteenth and twentieth century increasingly encompassed not only young people who committed a recognised criminal offence, but also those who fell within the reach of these measures as a consequence of other moral or social transgressions (Muncie, 2000), or for their care their and protection (Cox and Shore, 2002), or because young people often occupy more public space than adults and are thus usually the prime focus of police order-maintenance initiatives (Lee, 1981). An admission was increasingly also expected from

these cohorts to some form of wrongdoing in order avoid more formal processes.

The increasingly pernicious concept of the juvenile delinquent and the necessity of formal measures to assuage societal anxiety about their misconduct (Pearson, 1983; Dingwall and Harding, 1998) have further drawn young people into the criminal justice system. At the same, these measures increasingly sought to secure from young people some form of admission, either for practical reasons in order to ensure that an offence was made out in law, or to invoke instead some form of moral regret in young people (Braithwaite and Braithwaite, 2001; Harris, 2006; Scheuerman and Keith, 2015).

Given these considerations, the fact that at present a young person can only avoid a formal charge and prosecution in the Youth Court if they make a clear and reliable admission makes the admission criterion arguably one of the most important features of diversionary youth justice, and the need for further research considerable.

Additionally, primary research undertaken with relevant professionals for this thesis further found that all respondents held the view that the admission criterion was sometimes an unnecessary barrier to a diversionary outcome, but there was little consensus as to why (Chapter 8.1).

7.3 Case law

The literature review and secondary analysis examined the considerable body of case law where young people have failed to make an admission - or failed to make a satisfactory admission - and for that sole reason lost a diversionary disposal which they later unsuccessfully tried to secure through an appeal or judicial review *(R. v DPP Ex p. B* [1993] 1 All E.R.; *R. (on the application of F) v Crown Prosecution Service and Chief Constable of Merseyside Police* [2003] EWHC] 3266; *R. (on the application of O) v DPP* [2010] EWHC 804).

These young people all committed either low level offences or offences which were at one stage considered suitable for diversion within the diversionary gravity matrix, did not have prohibitive antecedents, were willing to engage in an interventionist package attached to a formal diversionary disposal, and there were no discernible reasons why their best interests were met by charging them and putting them before the Youth Court rather than issuing them with an out of court disposal. *R. v Durham Constabulary and another ex parte R* [2005] UKHL 21) can be distinguished from these cases as that youth wished to argue that the Final Warning he was issued with should be quashed, and he did not want another interview in order to make an admission.

What analysis of these cases fails to assist with however is whether these young people decided of their own volition not to make an admission, or whether their Appropriate Adult or legal advisor was in fact the primary

decision maker. These cases also do not assist concerning whether these young people ever understood the likely outcome if they did not make an admission, and their standard of capacity. The admission criterion and associated guidance has never made any allowance for the likelihood or possibility that young people may not in fact be the primary decision maker, or they may not sufficiently understand diversionary processes. The statutory regime holds young people entirely accountable for what account is given.

These cases also highlight the fact that the opportunities available to young people to make an admission are often very narrow, with only one police interview available to them, often at an unsocial hour. The circumstances in which these admissions are sought are also often whilst subject to the rigours of arrest, detention in police custody, and the stresses of a PACE interview. The views of stakeholders were therefor sought to explore these issues further.

7.4 Why has the admission criterion been neglected?

The lack of interest in the admission criterion is remarkable, especially given that that the Crime and Disorder Act 1998, which set out a radical agenda and was one of the most critiqued legislative initiatives of the entire New Labour period, not only formalised in statute the existing pre-requisite that a young person had to make an admission in order to gain eligibility for an out of court disposal, but it also enhanced the standard required.

Although the net-widening effect of some diversionary measures has been the subject of considerable critique (Pratt, 1986; Home Office, 1985; Bateman, 2002; Gelsthorpe and Padfield, 2003; Office of Criminal Justice Reform, 2010; Ministry of Justice, 2014), the practical gateways to a diversionary disposal have historically been neglected.

The absence of any real interest in the admission criterion was perhaps a consequence of a combination of factors, including the confusion between informal and formal cautioning, the fact that cautioning was traditionally a highly discretionary processes which operated in the absence of any material supervision or control, and that it also operated with considerable disparity of use throughout each regional police force (Osborough, 1965; Evans and Wilkinson, 1990; Bateman, 2002; Kemp and Gelsthorpe, 2003).

Additionally, the fact that the police caution and other diversionary measures have been subject to contradictory policy initiatives favouring either radical benevolence (Longford Committee, 1964; Cohen, 1985; Davis et al, 1989) or institutionalised intolerance (Muncie, 1999) together with the absence of any period of sustained consensus or constancy of processes (Bernard, 1992) perhaps obscured the fact that the admission criterion had become almost by accident an established feature of diversionary youth justice.

Furthermore, recognition of the significance of the admission criterion may have been subsumed not only by the incessant development of alternate diversionary processes, but also as a consequence of the blurred notion of what diversion was or was intended to achieve. There has never been a

cogent or definitive definition of diversion (Kelly, 2014), and throughout the innumerable periods of ‘near permanent reform’ has been an increasingly nebulous concept (Goldson, 2010:155) without any coherent theoretical basis (Tutt and Giller, 1983).

An understanding of the significance of the admission criterion was also arguably lost within the competing interests of the magistracy and the police, with the magistracy recurrently claiming that the police caution for young people usurped their primary jurisdiction, lacked sufficient independent scrutiny and monitoring, and had insufficient powers of punishment and restitution (Steer, 1970:18; Parker, et al, 1989; House of Commons Justice Committee, 2013).

The police caution also became inextricably associated with the hyper-politicisation of youth crime (Audit Commission, 1996), vitriol concerning the perceived failures of repeat cautioning of recidivist young offenders (Ball, 1995:198), perceptions of a ‘parenting deficit’ (Goldson and Jamieson, 2002:82) and previously tolerated adolescent nuisance behaviour which became increasingly classified as ‘anti-social behaviour’ (McLaughlin, et al, 2001).

The plethora of additional out of court disposals since 2005 (although subsequently reduced and simplified by the Conservative-led Coalition Government) resulted in confused standards and practices as to whether an admission was necessary by a young person in order to gain eligibility for an out of court disposal, and if so what form it should take.

7.5 Questionnaire and interview responses

As outlined at paragraphs 3.5 - 3.7 in this thesis, participants were invited in the questionnaire and interviews to consider a series of research questions. These sought to identify whether they accepted or rejected the primary research question, namely whether some young people are not admitting an offence when it is seemingly in their best interests to do so and unnecessarily forfeiting eligibility for an out of court disposal, if so for what reasons, and are there any alternative criterion or amendments to existing practices which may better facilitate young people gaining access to diversionary outcomes.

Remarkably, all of the possible reasons which were suggested in the questionnaires (Appendixes 3 and 4) were recognised by at least one participant from both groups, and only two other reasons not identified from the literature review suggested as reasons by the respondents. There was considerable variance however between police and legal representatives as to why young people do not make admissions and unnecessarily lose the benefit of an out of court disposal, and further variance between experienced and less experienced officers and civilian interviewers.

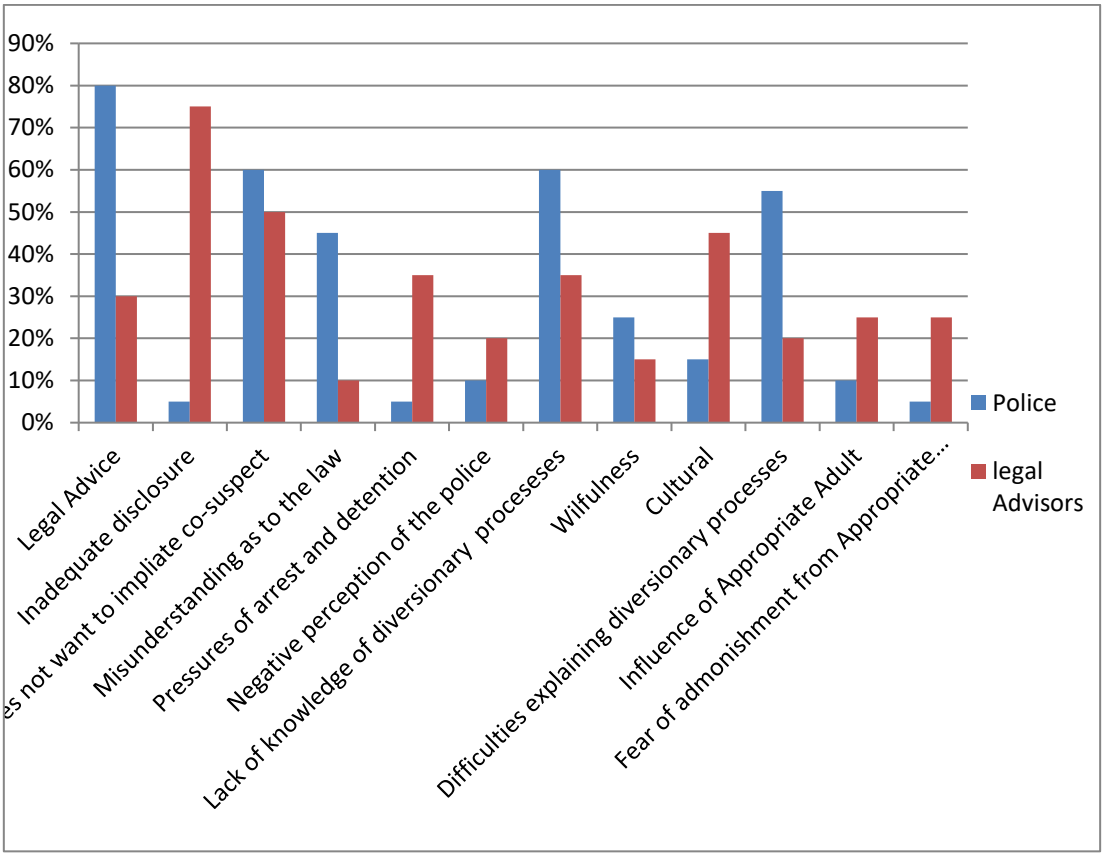

Figure 1 Respondent's views as to why some young people unnecessarily fail to make an admission

7.6 Legal Advice and admissions

A large majority of police officers and civilian interviewers - more than three quarters - held the view that the main reason young people did not make an admission and unnecessarily lost the opportunity to be considered for an out of court disposal was as a consequence of legal advice. In subsequent interviews however a distinct divergence in the views of experienced and inexperienced police officers, and civilian interviewers was apparent concerning why this happened.

More than two thirds of less experienced police officers and civilian interviewers believed that some legal representatives practised a blanket

policy of always advising their clients, even young people eligible for a diversionary disposal, to answer ‘no comment’ in police interviews.

One civilian interviewer said in their interview:

> ‘I just know it’s going to be no comment when x or x or x comes down to represent them, or it’s someone from x [firm of local solicitors], even when we want to caution. It’s always such a shame’ (CI4).

Police officers with 5 or more years’ experience however were less critical of this practice than civilian interviewers and less experienced police officers, and recognised it as appropriate advice on some occasions. They cited examples of good solicitors ‘playing the long game’ - although the young person they advised to exercise their right to silence lost the opportunity for a diversionary disposal, these solicitors were usually able to secure an acquittal later on, and advice to answer ‘no comment’ in fact achieved the best possible outcome for a young person.

Examples of these instances were when the prosecution evidence was reliant on witness evidence only, and not CCTV or forensic evidence, and competent solicitors were often able to assess at the police station stage of proceedings whether witnesses would likely later withdraw their support for a prosecution, and the case would consequently have to be discontinued, and it was at that stage in a young person’s best interests not to make any admission.

Experienced police officers were also more likely than less experienced officers and civilian interviewers to believe that when there was patently

sufficient evidence for a realistic prospect of conviction, the majority of legal advisors sought to secure a diversionary disposal for young people. They also recognised that legal advisors sometimes advised young people to make an admission when the evidence was perhaps border-line, in order to benevolently spare them the ordeal of an appearance in the Youth Court. This is commensurate with other research undertaken by Skinns (2011).

Although experienced police officers were aware of the perception that some legal advisors always advise suspects to exercise their right to silence, they generally held the view that although this did happen, this usually only applied to adult suspects or young people who were ineligible for a diversionary disposal anyway due to either the seriousness of the offence or existing antecedents. With one exception, experienced police officers did not accept that the primary reason young people routinely lost the benefit of a diversionary disposal was due to legal advice to answer ‘no comment’, and all believed there was no single reason, but rather a number of causes.

A majority of experienced officers held the view that the two primary reasons that young people did not make an admission when it was in their best interests to do so was (i) the difficulty the police had in explaining diversionary procedures without being accused of improperly inducing an admission, and (ii) the lack of knowledge amongst young people and their parents or other family member who acted as Appropriate Adults that an admission is a mandatory criterion to a diversionary disposal.

Experienced police officers were also considerably more sympathetic than civilian interviewers concerning the difficulties legal advisors were often confronted with when advising young people at the police station, with one officer of more than 10 years' experience stating:

> 'I really feel for some of these briefs, they're here advising these kids at all hours, the parents are often a nightmare, some officers are openly hostile to them, and it can't be easy (EP7).

Civilian interviewers were however considerably more critical of legal representatives than both experienced and less experienced police officers, with this latter cohort generally expressing views which were both positive and negative views in almost equal measure, effectively balancing them out. Civilian interviewers though often described an adverse and antagonistic relationship with legal advisors. They were also more critical of the quality of legal advice usually given, and expressed frustration that legal advice often led to young people not making an admission and forfeiting an out of court disposal. Their criticisms of legal advisors in giving such advice included:

- laziness;
- recklessly gambling that there was not sufficient evidence;
- throwing up as many hurdles as possible; and
- playing a game.

Less experienced police officers and civilian interviewers were also mostly of the view that when a young person exercised their right to silence it was usually as a consequence of legal advice, and not of the young person's own

volition or any other wider factors. Interestingly, more experienced officers stated that they believed sometimes young people rejected legal advice to admit an offence in a police interview, and made their own decision to answer ‘no comment’. They also believed that when an Appropriate Adult had a criminal record they were often the actual decision maker as to what account, if any, the young person should give, and they often insisted that the young person did not make any admissions in a police interview and went ‘no comment’.

Significantly, most experienced police officers held the view that legal advice at the police station usually contributed to a positive outcome for a young person, however fewer than half of less experienced police officers and civilian interviewers held this view. Similarly, most experienced officers believed that legal advisors usually had sufficient knowledge about diversionary procedures. This is contrary to other research which suggests legal representatives are often passive or uncritical of the prosecution case at the police station (McConville, et al, 1991). There was however a wide range of responses from the other cohorts both agreeing and disagreeing with this proposition, with no clear consensus.

This is partially consistent with other research which has found wide variance in the standard and competence of legal advisors (Steer, 1970; Evans, 1993; McConville and Hodgson, 1993; McConville et al, 1993; Evans, 1994; Morgan and Stephenson, 1994; Brown, 1997; Sanders, 1997; Sanders, 1998; Hine, 2007; Skinns, 2009a, Skinns 2009b, Kemp et al, 2011).

Despite the views of some of the respondents about the deficient knowledge base of legal advisors, almost all police officers - experienced and less experienced - expressed a preference that young people were represented by a legal advisor when interviewed in custody, citing reasons such as:

- ‘it makes it much easier, as the brief can do a lot of the explaining before the interview’ (EPO3)
- ‘the interview is usually quicker as they have already explained the caution already’ (JPO7)
- ‘it will protect me from any false allegations against me’ (JPO1)
- ‘they usually keep the AA [Appropriate Adult] under control’ (EPO1).

Almost two-thirds of civilian interviewers however expressed a preference that legal representatives did not attend the police station and advise young people in custody as:

- ‘you have to wait too long for them to get here, and the kids are kept at the police station for longer than is necessary’ (CI3)
- ‘they often turn young offenders against the police’(CI2)
- ‘they want to take control’(CI5)
- ‘they can be unnecessarily hostile’ (CI1).

A majority of all respondents however did believe that when young people were not represented by the Duty Solicitor, and had requested representation from a named firm of solicitors, they were usually represented by accredited legal representatives rather than solicitors, and more experienced solicitors were only likely to attend the police station when they were the designated

Duty Solicitor. This is consistent with other research which suggests law firms routinely deploy inexperienced staff for less serious matters (Baldwin, 1992; Evans, 1993; McConville and Hodgson, 1993),

Less than a third of legal advisors however were of the view that legal advice was the main reason why some young people who were eligible for diversion did not make an admission and unnecessarily lost a diversionary disposal. When they did recognise that this did happen, they overwhelmingly said this was primarily due to either:

i. a lack of sufficient pre-interview disclosure, and they had no option but to advise a young person to answer 'no comment' as they could not at the time assess whether there was enough evidence for a realistic prospect of conviction, or;
ii. an initial belief that the prosecution evidence was weak, but it was in fact sufficient for a realistic prospect of conviction.

Not one legal advisor, perhaps not unsurprisingly, accepted they advised young people to answer 'no comment' due to laziness, to inflate a fee or to manipulate any processes. They also rejected the suggestion of a culture of a blanket policy of advising 'no comment' interviews.

A majority of legal representatives expressed frustration in their interviews that the police were often unfairly critical of their advice to young people to exercise their right to silence. One typical example provided was when a young person was arrested for simple possession of a prohibited drug, but admitted to their legal advisor that they had in fact been supplying drugs. In

those instances, although a ‘no comment’ interview would result in the loss of a caution, it was preferable to being charged with the more serious offence and it was good advice – despite the police believing a diversionary disposal had been lost unnecessarily.

All legal advisors rejected in the questionnaire and interview other research findings that young people who commit low level offences are more likely to be represented by an accredited police station representative or less experienced solicitor (Baldwin, 1992; Evans, 1993; McConville and Hodgson, 1993). All respondents said that their firm had a rota for ‘own client’ police station call-outs which determined who was dispatched to the police station, and this was never determined by the gravity of the offence or age of the suspect. They also said that most young people who commit low level offences and have no recorded antecedents usually requested the Duty Solicitor rather than a named solicitor or firm of solicitors, and consequently would be represented by an experienced solicitor.

One unexpected result of the questionnaire however was that only two thirds of legal representatives believed that legal advice always contributed to a positive outcome for young people. In post-questionnaire interviews this was accounted for by the following reasons:

- a lack of specialist knowledge amongst solicitors and accredited police station representatives about youth justice in general, and especially diversionary procedures – over half said that it was time consuming keeping up with the continual changes in this area of the law, and they

were aware of other practitioners whose specialist knowledge was probably inadequate;

- exhaustion – many described onerous working conditions and excessively long working hours - which occasionally adversely affected the quality of their advice and representation at the police station;
- occasional failure to make proper enquiry about any existing antecedents and eligibility for an out of court disposal at the police station;
- professional obligations sometimes override what was in the best interests of a young person and they could not advise a young person to give a false account to the police, even it resulted in a less positive outcome.

This last example would partly explain Skinns' finding that young people have a higher chance of receiving an out of court disposal if unrepresented (Skinns, 2009a). Other research did however identify that some young people are making admissions in the absence of sufficient evidence and when there is no realistic prospect of conviction (Evans, 1993; Dixon et al, 1990; Brown, 1997; Kemp et al, 2011), and had they not made an admission it was unlikely there would have been any sanction at all. Given this, the issuing of an out of court disposal should not always be assumed to be a positive outcome, and although the presence of legal advisors may sometimes lessen the likelihood of receiving a caution or other out of court

disposals, it may also may improve the likelihood of a decision to take No Further Action.

The need for youth specialist legal representatives for young people who offend was evidenced during the interviews with legal representatives, as most appeared to have only a very basic knowledge of non-statutory informal out of court disposals, typically Youth Restorative Disposals and Community Resolutions. This may however not be unsurprising given these disposals are usually issued outside of the police station and ordinarily do not involve legal advisors, and at the time of the interviews the new provisions under LASPO had only just been implemented, and they were considerably less prescriptive concerning informal resolutions than the CDA.

7.7 Inadequate pre-interview disclosure

In contrast to the majority police view that legal advice was the primary reason young people did not make admissions and unnecessarily forfeited eligibility for an out of court disposal, more than three quarters of legal representatives expressed the view that inadequate pre-interview disclosure was the primary reason. An overwhelming majority of legal advisors felt that pre-interview disclosure was often inadequate or unreliable, and they routinely had to request and negotiate for access to an acceptable standard of pre-interview disclosure - even in circumstances where a low level offence had been committed and it was likely that a young person would receive an out of court disposal if they made an admission.

Interestingly, over two thirds of the police questionnaire responses said that the pre-interview disclosure they issued was an even mixture of written and verbal disclosure, whereas an almost identical number of legal advisors said it was predominantly written only. In follow-up interviews it did become apparent that more experienced police officers were likely to give far greater disclosure – both verbal and written – as well as show any CCTV footage or witness statements. The standard of pre-interview disclosure provided was however alleged by legal advisors to vary considerably - and more often than the police recognised - and was a highly discretionary police practice.

Almost all legal advisors stated that adequate pre-interview disclosure and constructive dialogue concerning the possibility of a diversionary outcome was more likely to take place when experienced police officers were involved in the interview process - this is consistent with the majority views expressed by experienced officers. Many leg indicated that it was particularly difficult to obtain sufficient information about the strength of the prosecution evidence or the likelihood of a diversionary outcome when civilian interviewers were involved.

As one legal advisor said:

> ‘some [civilian interviewers] are often really antagonistic, they want to control all of the processes really tightly, and don’t want to engage with us at all. They want everything done on tape in the interview’ (ES1).

When the issue of inadequate pre-interview disclosure was put to the police and civilian interviewers in the interviews, their responses revealed a distinct divergence of opinion amongst them, and correlated with the legal advisor view that the quality of pre-interview disclosure a young person was likely to receive was dependent on the experience of the person interviewing them.

More experienced officers accepted inadequate pre-interview disclosure may be a contributory factor, and indicated most of their early training had focused on the dangers of providing full disclosure and the need to control legal advisors and the interview. They did not recall any training concerning how to engage with legal representatives, young people or their Appropriate Adults about the possibility of a diversionary disposal.

All experienced officers said as they had gained more experience they became more confident providing fuller pre-interview disclosure, and also more confident engaging in constructive pre-interview dialogue with legal representatives. They also said this experience enabled them to identify legal representatives who were unlikely to intentionally misconstrue any pre-interview discussions about diversion.

This experienced cohort also expressed a more pragmatic view about pre-interview disclosure and dialogue with legal representatives concerning diversionary disposals. As one officer of the rank of Sergeant stated:

> ‘I’m happy to chat to the defence and give them what they need. If I can get a confession then I don’t have to put together a file for court, and it’s much less of a hassle’ (EPO7).

This Sergeant however indicated that he/she now rarely interviewed young people who commit low level offences and this was primarily undertaken by civilian interviewers and junior police officers, which is a significant finding for this research, as young people were found to be more likely to be interviewed by less experienced police officers and civilian interviewers.

Interviews with civilian interviewers corroborated the views expressed by legal representatives, and they accepted they were unlikely to provide full pre-interview disclosure or engage in any dialogue prior to an interview about the possibility of a diversionary disposal. Their responses revealed that their main goal was to control the interview process, they were reluctant to provide comprehensive pre-interview disclosure as they were concerned this would afford a suspect the opportunity to construct a defence, and preventing this was considered by most civilian interviewers as more important than securing an admission.

Civilian interviewers revealed they were - irrespective of experience - also reluctant engage in pre-interview discussion about a diversionary disposal, and felt most comfortable engaging only during an interview, where all discussions were tape or video recorded.

As one designated case interviewer stated:

> ‘it’s my interview, and that’s where I’ll tell them what the evidence is. I want it on tape, on record, so that there’s no dispute (CI5).’

Given that a young person suspected of committing a low level offence was more likely to be interviewed by a civilian interviewer than an experienced

officer, this finding is of significance. It suggests that young people interviewed by civilian interviewers are likely to receive only partial pre-interview disclosure, legal representatives are likely to be suspicious of the reliability of any disclosure from them, and there is unlikely to be any constructive engagement between civilian interviewers and legal representatives about a diversionary outcome. These factors may be a significant contributor to instances when a young person unnecessarily loses the opportunity for a caution.

7.8 Police fears of inducement and difficulties explaining diversionary processes

In response to the questionnaire more than a third of less experienced officers and over half of civilian interviewers said they ‘always’ felt unable to explain diversionary processes because they did not want to be accused of inducing an admission, and more than half of both these cohorts said they often found it difficult because it was a complicated procedure to explain to a young person.

A small minority of less experienced officers and more than a quarter of civilian interviewers also said they never engaged in pre-interview discussions about diversion with young people, Appropriate Adults or legal advisors. These findings are remarkable given the policy guidance that diversionary procedures should be explained prior to an interview (Ministry of Justice, 2013f:4.8)

The confidence of police and civilian interviewers to adequately explain diversionary processes to young people was also notably divergent, and again commensurate with experience. Experienced officers expressed noticeably greater confidence in discussing the possibility of a diversionary disposal prior to an interview than less experienced officers and civilian interviewers.

When asked in both the questionnaire and interview about any procedural changes which may better facilitate admissions and a diversionary outcome, the most common suggestion from police and civilian interviewers – including experienced officers – was that a pro-forma document should be generated which set out in plain and easily understood language the criterion and procedures for a young person to gain eligibility for an out of court disposal. Many of these respondents suggested in the interviews that it was a common expectation amongst lay people that eligibility for an out of court disposal was only dependent on age and gravity of the offence, with very few people aware of the mandatory admission criterion.

Interestingly, almost all of the legal representatives expressed some sympathy for police and civilian interviewers concerning the complexity of explaining diversionary procedures without inducing an admission, and recognised the police were unfairly exposed to false allegations of inducement when attempting to explain prior to an interview diversionary processes. Additionally, there was no suggestion by any legal representative that they had experienced a police officer or civilian interviewers knowingly

withholding information about diversionary procedures in order to improperly prevent a young person receiving an out of court disposal.

Some legal representatives who also acted as Youth Court Duty Solicitors did however disclose a number of incidents where they believed that if diversionary procedures had been properly or better explained to young people who did not have the benefit of legal advice or representation, it would have most likely resulted in an admission and out of court disposal.

7.9 The interviewing officer is not the decision maker – a barrier to admissions and diversion

The interviews revealed that the interviewing officer was ordinarily not the decision maker concerning the eventual outcome for a young person who committed a low level offence, and they often played no part at all in that process. Decisions were instead usually made 2-3 weeks after the interview outside of the custody suite by a police officer or civilian employee seconded to an internal Youth Offending Team, and occasionally by a Case Director or the CPS.

More than half of police respondents and a third of legal representatives suggested in interviews that this process made constructive pre-interview discussions concerning the possibility of a diversionary disposal difficult, and resulted in some young people unnecessarily losing the benefit of a diversionary disposal.

These responses were outside of the possible reasons suggested in the questionnaires, and had also not been identified in the literature review. One officer explained why he considered this process problematic, and said:

> 'I always say I don't know when they [legal advisor or Appropriate Adult] ask about the possibility of a caution, and tell them I'm the interviewer, not the decision maker. No one will decide anyway before the interview even if I asked them, as this is the protocol…the Custody Sergeant should be able to decide and the lawyers talk to them directly' (JPO5).

An experienced solicitor similarly explained:

> 'in the days when the Custody Sergeant's made the decisions at the police station there was usually a good discussion with them, and I felt far more confident advising kids to confess, as I had the guarantee that they would not get charged. I don't even bother to ask now as there is no point. If Custody Sergeants were given this role back, I'm sure more kids would be advised to confess as it's less of a gamble' (ES1).

When asked in the interviews what change or changes would better enable young people to make an admission and gain eligibility for diversion from the criminal justice system, almost three quarters of police and civilian interviewers said that decision making for low level offences committed by youths should be returned to the Custody Sergeant, and made as soon as

practicable after the police interview – ideally while the young person was still at the police station.

There was a consensus amongst these respondents that this would not only expedite the decision making process, which was considered too long and bureaucratic, but would also increase the number of young people making admissions as legal advisors would be more likely to advise young people to make admissions if they could offer an assurance that there would be a diversionary disposal.

Legal advisors similarly expressed a strong preference for decision making to be returned to Custody Sergeants, with more than half suggesting it would increase their ability to influence the decision making process, and consequently increase the numbers of young people receiving an out of court disposal. Many said that access to the decision maker was difficult as they were usually based at another police station, and decision makers were reluctant to engage in any dialogue with them prior to a determination. Funding problems were also cited by some legal advisors, who said unless a parent was in a position to fund private advice and representation, they were unlikely likely to make written representations or telephone calls to a decision maker to persuade them that an out of court disposal should be issued.

7.10 Reluctance to implicate a co-suspect and fear of being a ‘grass’

The reluctance of young people to implicate a co-suspect was identified by both the police and legal representatives in the questionnaire as the second most likely reason why a young person does not make an admission and

unnecessarily loses the opportunity to receive an out of court disposal. This is an important finding given the existence of other research which suggests young people are far more likely than adults to offend with at least one other (Sharpe, et al, 2005; Smith and Bradshaw 2005) and it is the perception of many young people that answering police questions in an interview, or any other positive engagement with the police, exposes them to allegations of being a ‘grass’ (Evans et al, 1996) or a ‘snitch; (Clayman and Skinns, 2011).

A number of police officers and legal representatives described similar instances when groups of young people had been arrested for ‘TWOC’ (Taking a motor vehicle Without Consent, contrary to section 12 of the Theft Act 1968), and all answered ‘no comment’ as none were willing to identify who the actual driver was. This was despite legal advice that forensic evidence would most likely establish who the driver was, and any passenger who made an admission would most likely receive an out of court disposal for the lesser offence of being carried in a stolen motor vehicle. Similarly, respondents described instances where young people had been involved in group violence or acts of criminal damage, and those young people with an easily identifiable lesser role who could have secured themselves a diversionary disposal refused to name or implicate the other offenders, and were consequently charged with the substantive offence.

There is no discernible evidence however that these contributory factors have been considered by policy makers when mandating under the numerous statutory diversionary regimes that young people must make a

satisfactory admission in order to gain eligibility for an out of court disposal. There is additionally no identifiable research examining how these factors influence admission rates and case disposal by any academic, professional or interested agency.

7.11 Cultural reasons and adolescent wilfulness

Cultural reasons were ranked on average by legal advisors in the questionnaire as the fourth most likely reason young people unnecessarily fail to make an admission and forfeit eligibility for an out of court disposal. This was a broad category however which incorporated sub-themes of social, ethnic and gender. Less than a quarter of police and civilian interviewers however identified any cultural issues as a reason.

The interviews sought to identify what any cultural reasons may be, and responses included:

- a fear of being seen as a ‘grass’;
- the ethos on certain local estates which discouraged engagement with the police under any circumstances;
- a belief gained from the ‘street’ that it is best to ‘go no comment’ in every police interview;
- race/ethnicity.

Although fewer police and civilian interviewers considered this to be a factor than legal representatives, it is relevant that as a consequence of legal privilege they are ordinarily excluded entirely from the decision making

process concerning what answers, if any, a young person should give in their police interview. Given this, the views of legal representatives may arguably have more weight than police officers and civilian interviewers concerning these factors.

A number of legal representatives described in the interviews examples where they had advised young people (mostly those aged 14-17 years) in the strongest of terms that there was sufficient evidence for a realistic prospect of conviction and an admission should be made to secure an out of court disposal, but this had been rejected by the young person because they held the firm and unshakeable view that 'no comment' answers should always be given.

These discussions were in private and the subject of legal privilege, and many legal advisors said the police were most likely to have assumed that the 'no comment' answers were a consequence of legal advice. These scenarios were however described as being more likely when an Appropriate Adult had a lengthy criminal record, or the young person lived on one of the local estates which had high levels of socio-economic deprivation, or as a consequence of other cultural factors such as ethnicity.

Some of these answers may however suggest that the option of 'cultural reason' in the questionnaire was too broad, as answers in the interviews disclosed that that having a parent with a criminal record or residence in a deprived neighbourhood was perhaps more of a demographic factor than a

cultural, although some respondents maintained that distinct behaviours could be ascribed to certain residential communities.

Although most police officers believed that ‘no comment’ interviews were usually as a consequence of legal advice to a young person to exercise their right to silence, there was some recognition from civilian interviewers and police officers that there was also a culture of ‘no comment’ interviews amongst some young people. These occasions were usually considered to be a consequence of young people who had a parent with antecedents, or they resided in certain estates with higher than average levels of crime and social deprivation.

The questionnaires and follow-up interviews also sought to examine whether the ethnic or racial profile of young people was ever considered to be a contributory factor when young people do not make an admission and unnecessarily forfeit an out of court disposal. There was little recognition from the police that this was ever a factor, with only a very small minority of respondents indicating they had experienced this scenario. Contrarily, just over half of legal advisors said they had experienced at least once young BME people rejecting their advice to make an admission knowing that this would forfeit a diversionary disposal. They believed the reasons for this were primarily associated with an adverse perception of the police and a refusal to engage with them.

There was considerable variance amongst legal advisors though as to how often this happened, with almost equal numbers indicating they had either

experienced this only occasionally and this was not their routine experience, or they had witnessed this more much frequently when they had worked in other cities with a higher BME population. It was significant however that just under half of legal advisors said they had never experienced this at all and discounted it entirely as a possible factor. Given this, in areas with low BME populations this issue may be of less significance, and the research cohort for this thesis was not sufficiently broad for this issue to be examined adequately.

Interestingly, one civilian interviewer, three police officers and one legal advisor described a separate cultural issue which had not been identified in the literature and questionnaire responses, and which may further explain why some young people do not make an admission when there is seemingly no advantage to them in not doing so. They all described separate instances when young girls from the Asian community suspected of committing low level offences denied any wrongdoing in their police interviews – often in the face of overwhelming evidence and putting forward illogical and nonsensical explanations – when their father acted as their Appropriate Adult.

These respondents suspected that an admission may have resulted in severe disciplinary consequences at a later date from either family or community, and as such these girls were more likely to assert their innocence rather than make an admission and gain a diversionary disposal. None of the respondents who raised this issue described any of these girls ever articulating any fear or objecting to their father acting as their Appropriate Adult.

These responses led to further a literature review concerning offending by Asian girls in England and Wales, and these responses appear commensurate with other research which found that key dynamics of Asian culture often impose on girls a uniquely high standard of moral regulation and cultural responsibility, and any criminality by them transgresses dynamics of family honour ('izzat') and shame ('sharam') (Toor, 2009). Given that an admission to an offence – even a minor offence - may thus result in significant cultural marginalisation and/or disproportionately punitive punishment, it should perhaps not be unsurprising that this cohort has been identified by some respondents as less likely to make an admission than others. There is no other identifiable research however which explores this possibility.

Adolescent wilfulness was also accepted by some respondents as occasionally a reason why some young people either exercised their right to silence or lied about their offending, though this was considered more likely by the police than legal representatives. Many civilian interviewers and police respondents described instances when young people behaved belligerently whilst in custody and during the interview process, and refused to engage constructively. It became apparent during the interviews however that these accounts were mostly representative of 14-17 year olds in police custody, and was less of an issue with 10-13 years-olds - who were instead described as more likely to be emotional rather than uncooperative.

This younger group was also described by some respondents from all research cohorts as more likely to lie about their offending than older youths,

and more likely to give an account which although acknowledged some wrongdoing, substantially minimised their own culpability. This is consistent with the body of other research which identified young people engaging in ‘cognitive distortions’ or ‘non-veridical beliefs’ (Palmer, 2004:102) as a psychological defence mechanism. This has also been variously described as:

- ‘shame displacement’ (Scheuerman and Keith, 2015);
- ‘tempering’, ‘reduced graduation’, ‘heteroglassic distancing’, ‘ideational perspective’ (Zappavigna, 2007);
- ‘neutralisation theory’ (Sykes and Matza, 1957); and
- ‘egocentric bias’ (Lickona, 1983).

7.12 Appropriate Adults

There was considerable divergence between the police/civilian interviewers and legal representatives concerning who was best placed to act as an Appropriate Adult, and whether this influenced in any way whether a young person made an admission.

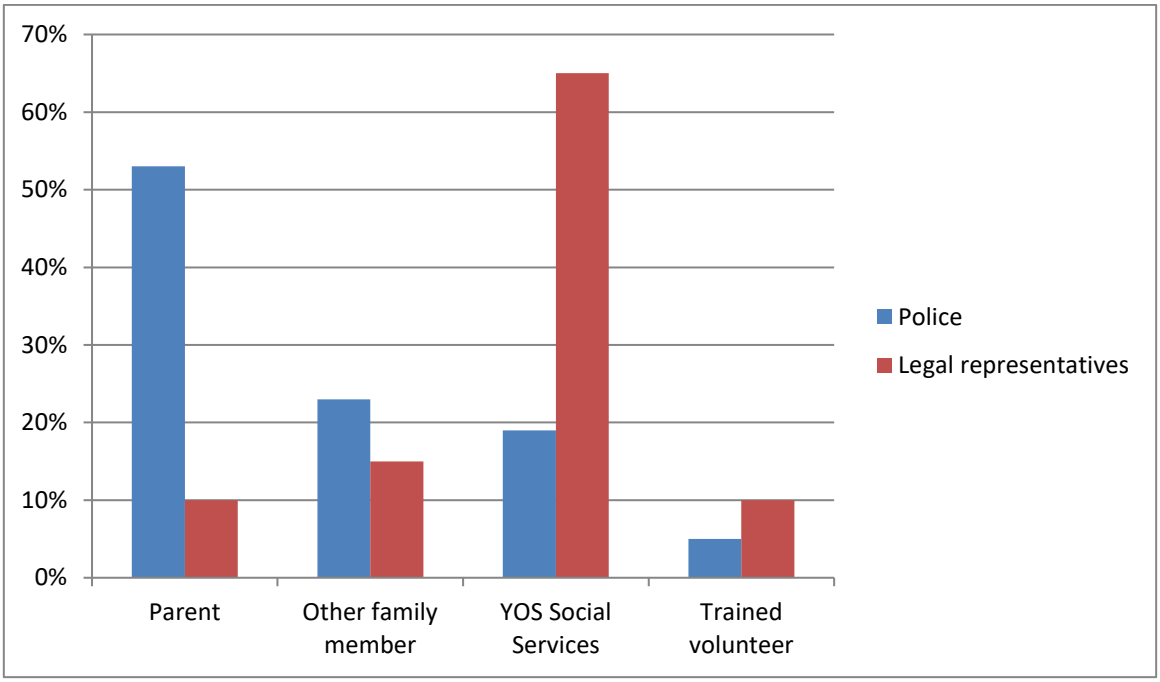

Figure 2 Respondents' perceptions of who is best to perform the role of the Appropriate Adult

Significantly, far more legal representatives than police and civilian interviewers expressed in the questionnaires the belief that Appropriate Adults who were co-ordinated and provided by YOS/Social Services were better able to perform this role, however a majority of police and civilian interviewers believed that parents were the most suited to perform this role.

There was a majority response from legal representatives in follow-up interviews that when a parent was an Appropriate Adult they often tried to influence what account their child should give, and young people rarely made their own decision as to what, if anything, to say in their police interview.

A majority of legal representatives also asserted that if a parent had never been in a police interview before, they often encouraged their child to make an admission in order to appear co-operative and a good citizen, and they

were not capable of adequately assessing whether there was sufficient evidence in the first place. Conversely, if the parent had a number of antecedents they were more likely to tell their child to answer ‘no comment’.

Legal advisors were also considerably more likely than the police and civilian interviewers to feel that parents were routinely not capable of adequately performing the role of Appropriate Adult, and often found the experience distressing. This is commensurate with other research findings that parents often perceive their role is to assist the police and not their child, and have reported feelings of fear and disorientation by the custody experience, despite not technically being detained themselves (Evans, 1993; Dixon et al, 1990; Brown, 1997; Kemp et al, 2011).

With the exception of the issue concerning Appropriate Adults for Asian girls (which was raised by a small number of respondents), the police were considerably more positive about parents acting as Appropriate Adults than legal advisors in their survey responses. In follow-up interviews it became apparent that the police were primarily positive about parents or other family members acting as Appropriate Adults only when they were of good character or had very old/unrelated antecedents, otherwise they preferred YOS/Social Services to undertake this role.

A majority of police respondents however felt that parents were faster at attending the police station than YOS/Social Services, who were perceived as taking too long to attend and delayed the interview and detention process. Just under half of less experienced officers and civilian interviewers also said

they found some YOS officers who acted as Appropriate Adults hostile and anti-police.

Legal advisors however expressed an overwhelmingly strong view that YOS/Social Services were more capable of performing the role of Appropriate Adult than parents, said they usually provided additional and helpful explanations concerning legal jargon and procedural matters, and were often able to make their own valuable assessment of the evidence and whether a young person should make an admission or exercise their right to silence. They also described YOS/Social Service officers who acted as Appropriate Adults as confident in facilitating some type of diversionary outcome with the police, and would often take on responsibility for this task post interview and make subsequent representations to decision makers after the legal advisor had ceased involvement.

Many legal advisors also said that young people appeared calmer and better behaved during their detention and police interview when they were assisted by YOS/Social Services rather than their parent, and when YOS/Social Services were present the police were more courteous to young people, but also, significantly, to legal advisors. A common theme was that legal advisors found their own experiences more positive when a representative of YOS/Social Services acted as an Appropriate Adult rather than a parent – though it was not apparent whether this had any impact on admission rates.

A majority of legal advisors however agreed with the police view that YOS/Social Services were unduly slow at attending the police station, and

were often responsible for delays in interviewing and releasing a young person from the police station. Many said that for minor offences and also when a young person was not known to YOS the delays waiting for their attendance were often so considerable that the police eventually had to bail a young person from custody without an interview, to return at a later date. These views are commensurate with other findings which were critical of the excessive detention of young people in custody as a consequence of waiting for a YOS arranged Appropriate Adult (Criminal Justice Joint Inspection, 2011; Her Majesty's Inspectorate of Constabulary, 2015).

It had been anticipated that more respondents may have expressed a positive view concerning trained volunteers acting as Appropriate Adults. In follow-up interviews it became apparent however that in this region there were very few trained volunteers, and most respondents had no or minimal experience of them. The positive responses to them in the questionnaires were found to be theoretical only.

7.13 Pressures of arrest and detention

This research has focused on a narrow cohort – young people who commit a low level offence, there is sufficient evidence for a realistic prospect of conviction, they have no or few antecedents, and if an admission is made they ordinarily would be eligible for an out of court disposal. In these circumstances, there should usually be no necessity to arrest or detain these young people in custody, as there is unlikely to be any no immediacy or

necessity in securing their detention, and the majority should be dealt with as volunteers outside of the custody suite.

This research found that according to all of the respondents, about half of all young people who eventually receive a Youth Caution or YCC are usually arrested and interviewed in the custody suite. The remainder are usually interviewed as a volunteer at the police station in a room outside of the custody suite, though about a tenth are interviewed either contemporaneously or later at home.

An understanding of these processes within the context of why some young people do not make an admission would add considerable depth to current knowledge, given that:

> 'Whilst it continues to be the case that the "trial starts at the police station", increasingly that is where the trial will effectively take place and the sentence imposed' (Cape, 2006: v; Jackson 2001).

Responses from the questionnaires and interviews disclosed that when a YRD or Community Resolution was issued, only around a tenth of young people were arrested and subjected to a PACE interview in the custody suite, and it was unlikely that a formal PACE interview took place at all. Informal questioning instead usually either took place at the police station but outside of the custody suite, contemporaneously, or at home.

Although there is a substantial body of research which has found that young people subjected to the processes of arrest, detention in police custody and a

formal PACE interview often experience considerable fear and distress (Evans, 1993; Brookman & Pierpoint, 2003; Evans and Ferguson, 1991), when a young person makes an admission under these conditions research and case law has primarily focused on the separate issue of whether this was a false confession due to these pressures (Gudjonsson, 1984, 1992, 2003). There is no known research which explores the alternative scenario, namely that they did not make an admission when it was seemingly in their best interests to do so, and if not why.

Follow-up interviews with police officers and legal representatives suggest that there were remarkably divergent police practices concerning whether a young person who was suspected of committing a low level offence would be arrested or interviewed in the custody suite, and police officers had wide and seemingly unsupervised discretion as to how they processed these young people. The experience of police officers also made no identifiable difference to whether an arrest would take before a police interview, or where the interview would take place.

Some police officers expressed a strong view that they would usually arrest any suspect, irrespective of age, and process them according to PACE procedures in the custody suite – this was considered more time efficient as the interview could be delegated to a civilian interviewer and they could return to more important duties, and it also ensured all procedures were properly recorded. Some of these officers felt that this process was also an efficient way of ensuring the rights of young people were protected – as unlike a contemporaneous interview they were guaranteed the right to free

legal advice - and processing a young person through the custody suite was also an additional safeguard against unfounded complaints against themselves or colleagues.

Other police officers however said that how they proceeded in these circumstances was usually dependent on the age of the young person, and they were less likely to arrest a young person aged between 10-13 years who had committed a low level offence, and would endeavour to interview them either contemporaneously, at home, or at the police station but outside of the custody suite. These officers either felt that the custody suite was not an appropriate place for these young children, or they had no opinion but understood that Custody Sergeants' wanted all efforts made not to bring very young people into the custody suite unless absolutely necessary. These officers said however that they were more likely to arrest 14-17 year-olds and process them through the custody suite as if they were an adult.

Civilian interviewers play no part in the arrest process and were exclusively based at the police station with the primary task of interviewing suspects, and said they usually interviewed young people aged 10-13 years either in the custody suite or in a side room, and these young people often attended via prior arrangement with their parent, or family member as their Appropriate Adult. Civilian interviewers mostly said they had a preference for interviewing this cohort outside of the custody suite and had established a tape/DVD recording facility in a side room for that purpose. When an interview did take place in the custody suite, it was usually because a young person had

requested legal representation and it was easier to facilitate this if they were taken there, as they understood the Duty Solicitor scheme did not apply to volunteers interviewed outside of the custody suite.

The act of entering the custody suite however usually resulted in many young people being arrested, despite often having attended the police station via prior arrangement as a volunteer, and with no discernible necessity in securing their detention. The civilian interviewers indicated that they understood this was the routine procedure when any suspect was interviewed in the custody suite and was necessary to generate a custody record, facilitate access to the Duty Solicitor Scheme, and also ensure that all procedures were carried out correctly whilst the young person was in the custody suite. This is an erroneous understanding of the law by this cohort (Edwards, 2009; *Richardson v Chief Constable of West* Midlands [2011] EWHC 773).

One of the most interesting findings from the interviews exploring this issue was that a majority of police and civilian respondents said that those young people who were not arrested or interviewed at the police station were more likely to receive an informal disposal, such as an admonishment, or an informal but recordable disposal - at that time a Youth Restorative Disposal (YRD) and then amended to Community Resolutions.

On the face of it, these findings suggest that the act of arresting a young person, irrespective of their age or the gravity of the offence, is the primary factor which propels them towards more formal procedures – and subjects

them to the rigid and mandatory admission criterion. However, it is of significance that YRDs and Community Resolutions are intended for very minor offences and as such an arrest is unlikely to have taken place, which suggests offence gravity may be the primary determinant as to whether a young person is subject to the statutory admission criterion or not, and more or less likely to receive an informal disposal. The effect of an arrest arguably still acts as a trajectory towards a more formal or punitive outcome in certain cases however.

The fact that the majority of legal advisors had little or no knowledge of YRDs or Community Resolutions is indicative that when legal advisors are involved a young person is less likely to receive an informal disposal. However, this may not necessarily be as a direct consequence of their lack of knowledge about these procedures, but rather because YRDs and Community Resolutions are often issued outside of the police station and without the involvement of legal advisors at any stage in those processes at all.

The significant finding for the purposes of this research is that the rigid and arguably onerous admission criterion does not apply to YRDs and Community Resolutions, and the respondents advised the usual requirements for eligibility were an acceptable standard of general remorse and a willingness to engage in any suitable restorative process. Consequently, if a young person could avoid arrest they appeared to have a greater chance of circumventing the admission criterion, and thus more likely to receive an informal disposal.

This research also sought to identify whether detention in police custody and a formal PACE interview influenced whether a young person made an admission or not. The majority of all police officers and civilian interviewers accepted that detention in police custody and a PACE interview could often be a frightening experience for those aged 10-13 years, but less so for 14-17 years who were described as appearing to cope sufficiently.

None of the police officers or civilian interviewers accepted other research findings that police used these processes as a 'frightener' (Brookman & Pierpoint, 2003), although some accepted that these processes were inevitably salutary. All respondents said when low level offences were committed by young people they tried to ensure the processes were as expeditious and sensitive as possible. Less than a tenth of these respondents accepted the proposition in the questionnaire that the stresses of detention in police custody and a PACE interview may adversely affect the answers a young person gives in their police interview or prevent them from making an admission.

A third of legal representative questionnaire responses did however accept that although the police did not intentionally use detention in custody as a 'frightener', some young people did not make admissions because they were too distressed or scared. In follow-up interviews though most legal representatives said that police and civilian interviewers usually treated young people who had committed low level offences with sensitivity, kept the interviews very brief - often no more than 20 minutes on average - and usually asked age-appropriate questions. Legal advisors were however

considerably more critical of detention and interview processes for young people aged 16 and 17 years, as well as younger youths who were recidivist offenders, and any youth suspected of committing a serious offence.

Four legal advisors said in follow-up interviews that another determinant of police treatment was often the attitude and demeanour of a young person, and young people who committed low level offences who were ostensibly eligible for an out of court disposal were more likely to be subjected to a more hostile and robust interview if they were behaving belligerently. Young people who were generally uncooperative or truculent during their arrest, detention or police interview were also considered by legal advisors as more likely to lie about their offending and deny any wrongdoing and consequently risk losing an out of court disposal.

An overwhelming majority of all police and civilian interviewer respondents were positive about the benefits of street bail - police powers to bail a suspect immediately after arrest to attend a police station at a later date – and believed this had the potential to keep young people out of the custody suite initially, and improve the likelihood of an out of court disposal being issued. For policy reasons however this Police Force Region has not sanctioned the use of any of the street bail provisions under section 4 of Criminal Justice Act 2003 (as amended ss.30A to 30D of PACE), and it was rarely used.

In follow-up interviews many legal advisors said that although they were supportive in principle of street bail, they were concerned that this unduly

increased the already wide discretionary powers available to the police, and may adversely prevent access to legal advice and assistance. One legal representative was especially critical, and of the firm view that the only way a young person's rights could be properly protected was in the custody suite. These views are commensurate with a subsequent publication from an eminent defence lawyer/academic which argues for the abolishment of street bail (Cape, 2016).

7.14 The age of a young person and their ability to articulate an admission

Analysis of current literature and case law (as discussed throughout Chapter Six) suggests that the standard of admission required from a young person has become increasingly onerous, with the expectation that young people make a clear and reliable or clear and unambiguous admission to all elements of the offence. This onerous criterion applies equally to all young people, with no distinction concerning the cognitive maturation which takes place between 10 and 17 years of age.

This research sought to explore the views of professionals involved in the interview and diversionary processes concerning whether age impacted on a young person's ability to understand and articulate an admission. No respondents answered that young people from either cohort were 'always' able to understand the legal elements of an offence or articulate a satisfactory admission. Over half however said in follow-up interviews however that this response would have been the same for adult suspects.

Over two thirds of police and civilian interviewers said that 10-13 year olds were ‘usually’ able to understand legal elements and articulate a satisfactory admission, a fifth said ‘rarely’ and a small minority said they did not know. None felt that 10-13 year olds were ‘never’ able to, but there was recognition that they were more reliant on better explanations and simpler questioning. There was no identifiable distinction in these responses between experienced and less experienced officers or civilian interviewers.

These responses were broadly similar in relation to 14-17 year olds, with more than three quarters answering ‘usually’, and a small majority answering ‘rarely’, or did not know. None of the respondents said ‘never’. When asked however whether there was any discernible distinction between 13 year olds and 14 year olds, all respondents indicated there was likely to be very little.

The questionnaire responses from legal representatives however diverged considerably from those of the police and civilian interviewers, with a quarter saying that 10-13 year olds ‘never’ understood the legal elements of an offence and cannot articulate a satisfactory admission, and the remaining three quarters saying this cohort could only ‘rarely’ do this. In relation to 14-17 year olds, just over half said they could ‘usually’, one quarter said ‘rarely’ and another quarter said never.

In follow-up interviews many legal representatives said it was artificial to attempt to distinguish these factors through age alone, as there were many other variables, including maturity, life experience, and any previous experience of a police interview. Somewhat surprisingly, not one respondent

from any cohort voluntarily suggested mental health issues as an additional factor, though most accepted this was a probable factor when asked in the interviews.

A small number of police officers and civilian interviewers - about a tenth - frequently misunderstood the question ‘are young people able to adequately understand the legal elements of the offence they are alleged to have committed’ and substituted or confused it with an entirely different proposition, namely ‘do young people know right from wrong’. These respondents were seemingly disinterested whether a young person understood legal definitions or whether they were able to articulate a satisfactory admission, and held the very firm view that young people almost always knew whether they had been naughty or not, and the real issue was whether they were prepared to admit to this.

Police officers with five or more years’ experience however were far more likely to acknowledge that young people sometimes found making a satisfactory admission difficult as a consequence of their insufficient knowledge or understanding of the legal elements of an offence, and their inability to articulate a clear and reliable admission. One officer {EPO5] said that the legal issue of joint enterprise was especially difficult for young people to understand, and they sometimes did not make a satisfactory admission when their role in a group offence was peripheral, as they did not understand they may also be guilty of the substantive offence.

An overwhelming majority – almost four fifths - of police and civilian interviewers however said they tried to interpret the answers young people gave in their police interviews as generously as possible, and to make allowance for the fact that young people – especially very young - cannot be expected to understand complex legal issues. Over four fifths also said that when a young person who had committed a low level offence made a general admission of some wrongdoing, appeared contrite and was willing to accept a diversionary outcome, they would either 'turn a blind eye', 'ignore' or 'generously interpret' any answers which were technically exculpatory. Legal advisors similarly said they would not usually make representations against a diversionary disposal in these circumstances, and would only do so if a positive defence or denial was raised.

These responses suggest that decision makers may be routinely disregarding the onerous standard of admission required from young people in order to facilitate as many diversionary disposals as possible, and often substitute the statutory admission criterion with a more flexible criterion. The lesser criterion requires only that some wrongdoing is acknowledged, some remorse is shown and there is a willingness to engage in a diversionary disposal. Although this is ostensibly a benevolent interpretation of the statutory criterion, it is also a highly discretionary practice which may not be exercised equitably, and prioritises the demeanour of a young person over the statutory admission criterion. This is a significant finding for the purposes of this research.

7.15 The Youth Conditional Caution criterion

The secondary analysis of the literature identified a significant anomaly between the admission criterion for Youth Cautions, which requires a clear and reliable admission before a decision is made as to whether a young person is eligible for this disposal, and YCCs. This latter provision does not require an admission to be made during a formal police interview under caution, or to be made prior to the determination that a YCC can be a suitable disposal. By vitiating the traditional need for a 'clear and reliable admission', and for a young person to demonstrate 'early frankness', the YCC criterion is arguably the most radical revision to youth justice diversionary practices since the formalisation of police cautioning in the 1970s. Very little literature seems to recognise this however.

The YCC scheme was in its pilot stage when the questionnaire and follow-up interviews were completed, and there were notable differences between the draft Code for YCCs which the questionnaire referred to, and the final Code implemented in 2013 ((Ministry of Justice, 2013b). The first draft of the Code suggested that no admission was necessary, however the final draft included an admission criterion but only at the point of issue. The findings from the questionnaire and follow-up interviews must thus be considered in this context, and that the research questions no longer reflect the current law.

It was also apparent during follow-up interviews with legal representatives that less than a fifth had an understanding or knowledge of what YCCs were, and the remainder were only familiar with Adult Conditional Cautions and had

assumed YCCs were identical. This can perhaps be accounted for given YCCs were only then in the early stages of implementation, and also the acknowledgement from many legal representatives their excessive work load made maintaining an adequate professional knowledge in youth justice practice and procedure difficult.

When YCCs were explained to legal representatives in the follow-up interviews, almost all responded that in principle this regime should be extended to Youth Cautions. The validity of these responses must however be considered in the wider context of a deficit of knowledge and experience of YCCs and youth justice procedures generally.

All civilian interviewers and police officers were however familiar with the YCC protocols and the changes to the admission regime, although none expressed confidence that they knew them well or to a satisfactory standard, as this was the primary task of decision makers and not interviewing officers. Almost all indicated however that YCCs were seemingly having little effect on any local practice, as decision makers were not comfortable offering a YCC unless an admission had been made in a police interview, and none were aware of any occasion where one had been offered in the absence of an admission in a police interview.

Just over half of civilian interviewers and police officers indicated that they thought extending the YCC protocols to other diversionary practices was a good idea and about a third said they found this objectionable either because it would be impracticable to implement or because a suspect, even a youth,

should make an admission at the earliest opportunity. The remainder were undecided.

This research was thus untimely for an examination of the practical application of YCCs, as the YCC regime was only a pilot scheme and at the very early stages of implementation. The only real findings which can be drawn are that legal representatives and the police were mostly positive about the YCC protocol replacing the admission criterion for Youth Cautions, however a minority of police officers had objections on either ideological or practical grounds.

7.16 Opportunities to make an admission

This research found that police and civilian case interviewers were overwhelmingly positive about the diversion of young people who commit low level offences from court by way of both formal and informal measures. They were also overwhelmingly willing to offer young people a further interview post-charge to make an admission, which is contrary to case law which encourages police forces not to do so in order to facilitate 'early frankness' (*R. (on the application of F) v Crown Prosecution Service and Chief Constable of Merseyside Police [2003] EWHC* 3266). Only two police responses were overtly negative about diversionary outcomes, with those officers of the view that out of court disposals often lacked sufficient rigour or punishment, failed to adequately compensate victims or acknowledge their suffering, and were outside of public consensus concerning how youth crime should be dealt with.

One surprising finding was that civilian case interviewers were more willing than police officers to offer more than one interview so that an admission could be made and a diversionary disposal secured, even post-charge. Almost all civilian interviewers said they would 'always' offer a second interview post charge. One civilian interviewer said:

> 'I'd like to think I would always give young kids a second chance' (CI4),

and another said:

> 'Ultimately, we're here to help them (CI1)'.

These answers were on the face of it inconsistent with the other research findings that the practices of civilian case interviewers may in fact hinder a diversionary outcome, given their reluctance to provide adequate pre-interview disclosure and engage in pre-interview discussions with legal representatives about the possibility of diversion (as discussed at paragraph 7.7). During the interview process it was apparent that most civilian interviewers did not recognise the inconsistency between some of their practices and their positive views of diversion.

Not one police officer answered that they would 'always' agree to offer second interview for a young person who had initially denied an offence, however two thirds said that they would 'usually' agree to a second interview if there was a 'good reason'. In follow-up interviews these reasons were held to be:

- the young person had genuinely not realised they needed to make an admission to receive an out of court disposal;
- the young person had received poor legal advice or had been unduly influenced by their Appropriate Adult;
- the young person had displayed subsequent genuine remorse;
- the CPS advised them to offer a second interview or the case would be discontinued on public interest grounds.

When questioned further concerning whether it would make any difference whether a young person had answered ‘no comment’, lied about their offending or put forward an inadequate admission in their first interview, the majority of police officers said this would make little difference. The primary reasons they would not offer a re-interview were when a young person had been especially belligerent or unpleasant during their detention or interview, or because they believed they had answered ‘no comment’ in order to ‘play the system’ and wait to see if there was enough evidence before they made an admission.

Almost a third of police officers however said they would ‘never’ offer a second interview post-charge, and these responses were all from officers with less than 5 years’ experience. Their reasons included:

- this would establish a precedent that young people could play the system;
- it was a waste of police resources;
- those who make an early admission should always benefit the most;

- annoyance as a full file had most likely been prepared for court, and this was a time consuming process.

Legal advisors consistently expressed frustration that decisions to offer a re-interview post-charge were variable and inconsistent. Almost all said they had experienced requests for re-interviews refused for reasons which they found either illogical or unduly harsh, but on other occasions they were very easy to facilitate. None said they had sought to appeal or judicially review any of the decisions they considered illogical because it was an onerous and complex task, and they believed usually had little prospect of success.

7.17 Views of stakeholders as to whether the admission criterion is necessary

All respondents were asked in their interviews whether an admission was necessary in order for a young person who has committed a low level offence to secure a diversionary disposal (question 11 of both interview schedules). This same question was also asked in the questionnaire (question 28 police and question 43 legal advisors). An overwhelming majority - more than three quarters - of police and civilian interviewers held the view that some form of admission should be made, but significantly, felt that the type of admission required should be broadened, and include an acceptable demonstration of remorse or contrition, or a general acceptance of wrongdoing. The advantages of retaining some form of admission criterion were cited as primarily its practical advantages during the diversionary process, for

example it is suggestive of a young person's willingness to participate in any diversionary package, and likely success of a restorative initiative.

Legal advisor responses were almost equally divided however between abolishing the admission criterion entirely on the grounds that it is too onerous and often unnecessary, and alternatively retaining it but broadening the range and types of admission required. These latter views were virtually identical to the majority police responses, and it is a significant finding that these respondents were supportive of practice operating in Canada, The Republic of Ireland and New Zealand, namely a standard of admission which only requires a general 'acceptance of responsibility'. It is also significant that these respondents were critical of the current statutory admission criterion currently in operation under LASPO (Chapter 6.28).

7.18 Need for further research?

Analysis of the development of the admission criterion within diversionary practices identified the absence of any known research concerning the historical and current admission criterion, as well as a dearth of statistical evidence concerning how many young people unnecessarily lose the benefit of an out of court disposal for the sole reason that they do not make an admission.

There is additionally almost no research or evidence as to how often this happens and for what reason. Although the research undertaken for this thesis identified that the admission criterion was considered too onerous and unnecessary by a majority of respondents, and did result in lost opportunities

for diversionary outcomes, it was also – and contrarily – often ignored, with decision makers focusing instead on other highly discretionary factors, primarily the demeanour of a young person during their police interview. Of potential significance was also the absence of any comment or apparent concern by any of the respondents as to whether the admission criterion is compliant with statutory welfare and human rights considerations (Chapters 5 and 6.12).

There is arguably potential for other quantitative research which could determine how many young people who commit low level offences unnecessarily lose the benefit of an out of court disposal for the sole reason that they fail to make an admission, and for what reasons. Much of this data (as discussed at Chapter 3.9) - custody records, police interview tapes, witness statements and court records - could conceivably be collated from information adduced by the police, YOS, the CPS and Her Majesty's Court Service (the Youth Court).

There are also identifiable opportunities for other probative qualitative research - primarily by way of interviews with young people and their Appropriate Adult about their experiences in custody and their police interview, and why they did not make an admission. This would most likely add considerable erudition to these research findings, any other quantitative data which could be gathered, and well as to wider knowledge in this field. Interviews with those who act as Appropriate Adults would also be likely to add similar value. For ethical reasons (as set out at Chapter 3.8) it was not possible to undertake this quantitative research.

8.0 CHAPTER EIGHT: CONCLUSION

8.1 Summary of primary research findings

Analysis of the views of police officers, civilian interviewers and legal advisors from the questionnaires and interviews, within the parameters of reflective action research and framework analysis (as discussed at Chapters 3.2 and 3.7) identified a number of significant thematic trends.

These trends must be considered however within the broader context that the research cohort was a small number from only one county, and there is a substantial body of evidence that disparate diversionary practices operate throughout England and Wales (Bateman, 2002; Goldson, 2010). The thematic trends from this research may not be reflective therefore of practices in other regions of England and Wales, or even other regions within this one county.

Given however the absence of any other similar research, these findings are arguably still probative and contribute further knowledge to this little researched and understood area of youth justice.

Identifiable thematic trends include:

(i) Almost all respondents were of the view that some young people do unnecessarily lose the benefit of a diversionary disposal because they unnecessarily fail to make an admission.

(ii) Less experienced police and civilian interviewers primarily believe this to be because of inadequate legal advice.

(iii) More experienced police officers however believe this to be because of the difficulties the police have in explaining diversionary procedures without inducing an admission, as well as a consequence of a lack of awareness by most people of the importance of the admission criterion.

(iv) Legal advisors believe that inadequate pre-interview disclosure is the primary cause, and this is a highly variable, unregulated and discretionary practice.

(v) Young people who commit low level offences are more likely to be interviewed by civilian interviewers and less experienced police officers, and these two cohorts are less willing or able than experienced police officers to provide comprehensive pre-interview disclosure or engage in constructive dialogue about the possibility of diversion before an interview. Civilian interviewers were also especially hostile toward engagement with legal advisors.

(vi) A significant majority of all police officers and civilian interviewers had a positive view about the benefits of diversion for young people who commit low level offences, and many are willing to offer more than one opportunity for an admission to be made, despite case law discouraging this practice.

(vii) A significant majority of all respondents believed that there should be some form of admission or recognition of guilt by a young person, but the

current statutory admission criterion should be substituted with a less rigorous criterion. The most common suggested alternative was that a young person demonstrates an adequate acceptance of responsibility, similar to the models operating in Canada, The Republic of Ireland and New Zealand.

(viii) A significant majority of all respondents believed that more admissions and diversionary outcomes would be facilitated if decision making was returned to Custody Sergeants.

(ix) A significant number of all respondents believed there needs to be improved guidance for the police so that they can explain the importance of the admission criterion without risking inducing an admission.

(x) Legal representatives require more support in maintaining a satisfactory standard of knowledge concerning youth justice diversionary practices, but they are overwhelmingly in favour of diversionary outcomes.

(xi) Police officers and civilian interviewers often favourably interpret the answers young people give in their police interviews as a satisfactory admission if the young person demonstrates an appropriately co-operative and remorseful demeanour. Although ostensibly benevolent, this is an unregulated, discretionary and sub-judicial practice which is potentially highly discriminatory.

8.2 Historical Perspective

Notwithstanding the almost continual ‘circular motions’ (Goldson, 2013a:3) concerning diversionary practices, at present there is general consensus that

diversion is a desirable outcome for young people with no or few antecedents who commit low level offences, and this disposal now accounts for over a third of outcomes for detected youth offending (Youth Justice Board, 2015). Given this, it is arguably timely that the admission criterion is examined as an impediment to diversion.

Despite the fact that out of court disposals have always been a central tenet of youth justice practice and procedure, the development of the mandatory admission criterion within diversionary processes has largely been overlooked by academics, professionals and the judiciary. This thesis has sought to identify the gaps in current academic and professional knowledge concerning whether some young people unnecessarily lose the opportunity to receive an out of court disposal because of this criterion, and if so, for what reasons.

Original secondary analysis of existing white and grey literature, policy documents and case law, supplemented by original primary research, endeavoured to identify why, how and when the admission criterion became central to diversionary processes, what standard of admission is currently expected of young people who offend, whether the mandatory admission criterion is a necessary, proportionate or reasonable pre-requisite for young people who commit low level offences, how is the admission criterion understood and implemented by relevant professionals, and what amendments or alternatives may better enable the diversion of young people who offend from formal processes.

Chapter Four examined the development of the police caution and the notion that trivial and minor offences committed by young people has not always necessitated a prosecution, and this is an historical feature of criminal justice processes in England and Wales (Sharpe, et al, 1980) until the late twentieth century. Alternatives to formal procedures developed spontaneously and at different times throughout England and Wales (Dingwall and Harding, 1998), and regional police forces developed of their own volition the practice of informal and formal police cautioning, though this was often in conflict with the efforts of the magistracy to retain jurisdiction over young people who offend, and was not immediately embraced by all forces (Tutt and Giller, 1983).

This highly discretionary sub-judicial practice became by the early twentieth century a conventional but non-statutory police function (Emsley 1983), and considered by most (but not all) as an enlightened and pragmatic model of police practice, which improved recidivism, reduced congestion in the Youth Court, introduced compassion into often harsh processes, and despite the absence of supervision or other statutory safeguards was believed to be generally used wisely (Lord Bingham in *R. v Durham Constabulary and another ex parte R* [2005] UKHL 21).

This practice was never universally supported however, and critics argued it criminalised many youthful behaviours which ordinarily would have been dealt with informally, regional variations in its use were often unacceptably high, it usurped the proper role of the magistracy, allowed repeat offenders to act with impunity, and was too highly discretionary and improperly permitted

excessive police control over young street populations (Bottoms, et al, 1970; Goldson, 2000; Bateman, 2002). The absence of clarity as to what diversion means within youth justice practices (Kelly, 2014) and the often unintended net-widening consequences of some interventionist diversionary measures (Bateman, 2002, Ministry of Justice, 2010a) was also a contributory factor when it cyclically fell out favour (Goldson, 2002).

Despite its extensive use by the 1950s, and efforts by the Home Office thereafter to impose uniform standards and practices (Home Office,1968; Home Office, 1970; Home Office, 1976; Home Office, 1978; Home Office, 1980; Home Office, 1985), the police caution remained a discretionary police practice until the 1990s, when youth cautioning fell spectacularly out of favour and a period of populist punitiveness began (Evans and Puech, 2001). Throughout however the oscillations of support and hostility for the police caution, the original secondary analysis in Chapter Four found that the admission criterion remained a central tenet of this practice, and it has almost always been customary in England and Wales that young people make some form of admission in order to be considered eligible for an out of court disposal.

8.3 Is the mandatory admission criterion for the purpose of diversion evidence based?

There is an absence of evidence as to why an admission became central to cautionary practices, and why it eventually became so important that it usurped other statutory and international obligations which prioritise a young

person's best interests. Although the principle that it is generally good for young people to own up when they have done wrong (Lady Hale, *R v Durham Constabulary and another ex parte R* [2005] UKHL 21) is on the face of it uncontroversial, this thesis suggests that the admission criterion arguably embodies an additional desire to induce shame management and moral regret in young people (Braithwaite and Braithwaite, 2001).

This is in tension with a body of other evidence that suggests young people - as a consequence of no more than ordinary adolescent behaviour - often minimise their own culpability during police interviews or restorative processes, and engage in 'shame displacement' (Scheuerman and Keith, 2015), 'tempering', 'reduced graduation', 'heteroglassic distancing', 'ideational perspective' (Zappavigna, 2007), 'neutralisation' (Sykes and Matza, 1957) and 'egocentric bias' (Lickona, 1983).

Requiring a young person to make some form of admission to the police in order to secure an out of court disposal also fails to recognise the additional cultural and societal pressures they are often subjected to. Young people are more likely than adults to report negative attitudes toward the police and others in authority (Hurst and Frank, 2000), and consequently less willing to engage with them. They are further subjected to greater fears of 'grassing' if they make any admission as they are more likely than adults to have offended with another, and are more exposed than adults to the 'no grass rule' and powerful moral code which exists in many high crime estates (Yates, 2006).

Although further research is necessary, there is the possibility that the admission criterion is inherently discriminatory. There is evidence which suggests young BME youths are less likely than their white counterparts to receive an out of court disposal (Landau and Nathan, 1983; YJB, 2010), and although this is arguably as a consequence of the 'multiplier effect' of many interrelated factors (Goldson and Chigwada-Bailey, 1999:63), there is evidence that some young BME youths are reluctant to make an admission, and consequently forfeit eligibility for an out of court disposal (Woodhill and Senior, 1993). Despite this evidence, the current statutory regime mandates that an admission must be made by all young people, and it should be further reconsidered as a potentially situational and institutionally racist practice, given it is a universally framed procedure which is perhaps unwittingly discriminatory (Scarman, 1981).

The research undertaken for this thesis also identified that young Asian girls may be less likely than their white peers to make an admission, as their offending may transgress cultural dynamics of family honour ('izzat') and shame ('sharam') (Toor, 2009). There is no other identifiable research however concerning this issue and at present a considerable knowledge gap.

8.4 The circumstances in which admissions are obtained should be reconsidered

The circumstances in which admissions are sought from young people with no or few antecedents who have committed a low level offence are arguably restrictive and unnecessary, and may be a contributory factor in instances

when young people fail to make an admission when it is in their best interests to do so. The routine practice of arrest, detention in police custody and a formal police interview, often at unsocial hours, makes no allowance for the fact that many young people are often in a de-stabilised state as a result of their detention (Littlechild, 1995; Littlechild, 1998:8), and the 'coercive power' of arrest often induces 'alarm and dismay' and may make them 'psychologically vulnerable' (Evans, 1993:25-26; see also Gudjonsson and Clark, 1986). Despite this evidence, the statutory regime assumes all young people are able to make a rational and measured decision as to what account, if any, to give to the police, whilst subjected to these pressures.

The opportunities available to young people to make an admission are highly restrictive, and the court has endorsed expediency at the expense of the welfare principle (*R. (on the application of F) v Crown Prosecution Service and Chief Constable of Merseyside Police* [2003] EWHC 3266). The information available to young people and their Appropriate Adult before a police interview concerning the importance of making admission if diversion is to be secured is inadequate, and in tension with conflicting common law principles prohibiting decision making before an admission is made (*R (Thompson) v The Commissioner of the Metropolitan Police* [1997] W.L.R. 1519).

Police training also discourages pre-interview engagement concerning both disclosure of the evidence and possible outcomes if an admission is made (Bryant and Bryant, 2014), and this research found that the fear of unfounded allegations of inducement is often a material barrier to civilian interviewers

and less experienced police officers providing useful and objective pre-interview information.

8.5 Inadequate pre-interview disclosure is a significant cause of unnecessary 'no comment' interviews

The research undertaken with relevant professionals also found that inadequate pre-interview disclosure is considered by a majority of legal representatives as the primary reason young people exercise their right to silence and unnecessarily jeopardise or lose a diversionary disposal. There was no finding in this research that police and civilian interviewers were wilfully withholding information about the evidence in order to prevent or obstruct a diversionary outcome, however civilian interviewers and less experienced police officers were found during the interviews to lack confidence in providing adequate pre-interview disclosure. They were also prioritising interview strategy and maintaining control of the interview process above engagement concerning possible outcomes. Given these findings, there is a need to reconsider additional police training concerning improved pre-interview disclosure processes.

8.6 The mandatory admission criterion is onerous and in conflict with competing international and statutory obligations

Chapter Five examined the admission criterion within the context of human rights obligations, and argues that the mandatory admission criterion, which was rigidly prescribed in the CDA and continues under LASPO, is in tension with the United Kingdom's obligations to ensure domestic legislation is

compatible with international human rights instruments (Muncie, 2010; Hollingsworth, 2012). These various instruments impose on decision makers a duty to have regard during all stages of the decision making process to the welfare of a young person, and what outcome it is their best interests (The 'Beijing Rules' 1985; United Nations Convention on the Rights of the Child, 1989). The statutory admission criterion appears inconsistent with these international human rights obligations

Chapter Six examined the admission criterion in an historical and procedural context, and argues that the nature and standard of admission required from young people who offend developed in an ad hoc and customary manner (Steer, 1970), but became by 1985 a rigorous criterion, with a young person expected to not only admit all or some of the facts but also to 'recognise his guilt' (Home Office, 1985:1). The admission criterion under the CDA then became ill-defined, (Home Office, 2002:4.12) and unnecessarily amplified (*R. (on the application of M) v Leicestershire Constabulary* [2009] EWHC 3640).

The standard of admission required during alternative restorative processes in England and Wales was also explored in this chapter, and this revealed that a significantly less restrictive test was in operation, and required a young person to simply demonstrate a general acceptance of responsibility (ACPOa, 2012:2.1). This was consistent with the more flexible standard of admission operating in some other jurisdictions, such as Canada and The Republic of Ireland, which only require an 'acceptance of responsibility' (section 10(2)(e) Youth Criminal Justice Act 2002, Canada; Section 18

Children Act 2000, Ireland). The New Zealand FGC model also recognises that it is often only upon completion of restorative processes that a young person begins to understand their own culpability and the impact of their offending (Lynch, 2012). The standard of admission being operated in Northern Ireland's Youth Conferencing was however found to be highly onerous (Maruna, et al, 2007) and perhaps more rigorous than that required under the CDA and LASPO.

Chapter Six also analysed a number of reported appeal cases which underlined how the admission criterion resulted in lost opportunities for diversionary disposals (*R. v DPP Ex p. B* [1993] 1 All E.R.; *R. (on the application of F) v Crown Prosecution Service and Chief Constable of Merseyside Police* [2003] EWHC] 3266; *R. (on the application of O) v DPP* [2010] EWHC 804), and argues that the decision to prosecute in those cases was perhaps unnecessary. This thesis also argues that the unsuccessful appeal in the seminal case of *R. v Durham Constabulary and Another ex parte R* [2005] UKHL 21 may have been different if the appellant had sought to argue that the Final Warning issued to him should have been quashed because he believed he had never made a satisfactory admission, rather than seek to have it quashed on a separate human rights argument.

The research undertaken for this thesis corroborated an earlier finding that formal cautions are sometimes issued in the absence of any clear admission being made (YJB, 2004:7). Analysis of the respondents' views suggests that police and civilian interviewers often favourably interpret the answers young

people make in their police interviews as a satisfactory admission if a young person has demonstrated an appropriately co-operative and remorseful demeanour. Although this may on the face of it be a benevolent practice intended to divert as many young people as possible, it is also highly discretionary and exposes the admission criterion within diversionary processes to discriminatory, inconsistent and unregulated practices.

8.7 Legal advisors – the case for specialist youth justice accreditation?

The literature review and case law analysis suggests that the role of the legal advisor within diversionary processes is highly variable, with contradictory findings as to the quality and consistency of advice and representation (Baldwin, 1994; McConville, et al, 1991; Skinns, 2009; *Caetano v Commissioner of Police for the Metropolis* [2013] EWHC 375 (admin)). The research undertaken for this thesis also found that a majority of civilian interviewers and less experienced police officers held a strong belief that poor legal advice was the primary reason young people unnecessarily lose the benefit of an out of court disposal.

The questionnaire and interview findings however suggest that legal representatives care deeply about the outcomes for the young people they represent, and there is insufficient recognition that the advice they give is often a consequence of perceived inadequate information about the evidence, and the circumstances in which they represent young people is challenging, especially as civilian interviewers and inexperienced officers are reluctant to engage with them.

One of the most unexpected findings from this research however was that not all of the legal advisors who participated believed that that legal advice always positively contributes to a young person's outcome when in police custody. During the interviews it became apparent that some legal advisors were not fully up to date with recent youth justice legislative changes due to their considerable work pressures, and required additional support to be able to do so. Given this and the other research findings discussed at Chapters 6.21 and 7.7, there is arguably merit in introducing mandatory youth justice accreditation for legal representatives, and may improve diversionary outcomes.

Research with legal advisors also found that an overwhelming majority believed that inadequate pre-interview disclosure was a primary cause of 'no comment' interviews and unnecessarily resulted in lost opportunities for diversion, as they were reluctant to advise a young person to make an admission until they could be satisfied that there was a realistic prospect of conviction. Given these findings, improvements to the quality of pre-interview disclosure could be efficiently made through training initiatives, and may significantly increase the number of young people making admissions and gaining eligibility for an out of court disposal.

8.9 The practical benefits of the admission criterion

Although this thesis has sought to explore whether the admission criterion is onerous and unnecessary, the literature review identified a number of its practical benefits within diversionary processes, and they should not be

underestimated or unacknowledged. A majority of police officers also held the view that it was an important aspect of diversionary processes. An admission often satisfies the evidential requirement that there is a realistic prospect of conviction, simplifies and expedites decision making processes, and facilitates resource efficiencies. Re-offending is also generally considered less likely when a young person understands or acknowledges their wrongdoing (Newbury, 2011). It is also considered by some to enhance their autonomy and citizenship (Hollingsworth, 2012) and an important temporal aspect of responsibility (Honore, 1999; Cane, 2002).

It must also be acknowledged that the introduction of the rigorous standards of admissions in (Home Office, 1994; Home Office, 1999) was in part intended to protect the rights of young people by ensuring that decision makers apply a high standard of scrutiny to the answers young people provide (Moston and Stephenson, 1993), as well as impose better uniformity of practice. Additionally, this thesis recognises that a failure or refusal to make an admission can on occasion result in a decision to take No Further Action against a young person, or contribute to a subsequent acquittal at trial, and a young person’s interests are sometimes best served by not making an admission at all.

8.9 Alternatives and amendments to existing practices

A majority of respondents held the view that some form of admission was necessary from a young person during the diversionary processes, mostly for practical reasons, but the nature and type of admission should be broadened.

The Canadian, Republic of Ireland and New Zealand models, which requires simply a general ‘acceptance of responsibility’ were considered the most suitable.

This research identified that there is an absence of any data concerning to what extent young people unnecessarily lose a diversionary disposal for the sole reason that they do not make an admission. While further research is necessary to demonstrate the extent that this occurs, this does not preclude the introduction of a range of measures which can lessen the impediments of the admission criterion. This thesis additionally sought to identify suitable alternatives to the current statutory admission criterion, and found a number of feasible options - it is hoped this thesis generates further interest in exploring these alternatives.

The YCC criterion is arguably one of the most radical departures in diversionary youth justice practices since the formalisation of the police caution over a century ago. It does not require an admission to be made at the outset or in a police interview, and can instead be made at the point of issue, potentially facilitating the offer of an out of court disposal at an early stage in the decision making process. This may be a more suitable alternative than the current Youth Caution regime and particularly advantageous to young people who are unwilling to engage with the police in a formal police interview. It is of significance however that a majority of respondents felt that it was a very complicated process and were not embracing it with any real enthusiasm.

Alternatively, within the existing statutory regime under LASPO, the standard of admission could be substituted with the less rigorous pre-condition currently operating in other jurisdictions such as Canada, New Zealand and The Republic of Ireland, which requires only an 'acceptance of responsibility' for the alleged offence. This research found that despite the statutory requirement that a clear and reliable admission should be made, decision makers are on occasion substituting this rigid test in any event with the lesser test being operated in those other jurisdictions, and young people are often gaining eligibility for an out court disposal as long as they acknowledge some wrongdoing and display a suitably contrite demeanour. It was also the preferred alternative of all respondents. Given this, there is seemingly little disadvantage in formally adopting this criterion, which is operating unofficially in any event.

It is acknowledged however that this research was undertaken with a very small research sample, and given the known regional variations in cautioning practices, it may be that other regions are strictly applying the statutory test, as *R (F) v CPS and Chief Constable of Merseyside* [2003] EWHC 3266 suggests.

Another alternative model could be the expansion of the non-statutory Youth Restorative Disposals Guidance (Ministry of Justice, 2011a), which entirely reverses the admission criterion, and instead mandates that a young person is eligible for a YRD if they have:

> ‘not denied outright involvement for the behaviour amounting to an offence or harm’ (Ministry of Justice, 2012:4.1).

This more flexible test not only moderates the standard of admission required, but vitiates the need for young people to understand and articulate complex legal matters, as the criterion focuses instead on recognising behaviour and harm caused. Adopting this model could however have the adverse consequence of inadvertently widening once again the net of young people who fall within the criminal justice system unnecessarily, as it extends the criminal law to broader concepts of ‘harm’ caused, and this does not necessarily equate on every occasion to an actual criminal offence, and which does not always have to attract a recordable sanction.

A more radical alternative to the existing statutory diversionary regime would be to abolish entirely the admission criterion as a mandatory gateway to an out of court disposal, and substitute it with a presumption that a young person is suitable for a diversionary disposal if they have committed a low level offence under a Gravity Factor Matrix, they have no or few relevant antecedents, have not put forward a denial or defence at any stage, and are willing to accept and engage in a formal and recordable diversionary disposal. This has the potential to end the disadvantageous position experienced by many BME youths already identified in current literature, and also to the Asian girls this research identified who may possibly be subject to the pressures of ‘izzat’. It also neutralises the consequences of any

reluctance to implicate a co-suspect or engage constructively with those in authority.

In addition to changes to the current statutory regime, this thesis invites further debate concerning the need for 'early frankness' from young people in order to gain eligibility for a diversionary outcome, as well as a review of the number of opportunities available to make an admission (*R (on the application of F) v Crown Prosecution Service and Chief Constable of Police* [2003] EWHC 3266). Although expediency is usually desirable within criminal justice processes, young people are usually permitted only one opportunity to make an admission - often whilst subject to the pressures of arrest and interview - and requiring early frankness may be at the expense of other welfare and human rights obligations.

This thesis seeks to invite further interest and research on the suitability of all of these alternative criterion and regimes, to further fill the substantial knowledge gap concerning the admission criterion within current diversionary processes. However, the literature review collated a significant body of research which identified the historically adverse and often inadvertent 'net-widening' effects of many ostensibly welfare orientated diversionary measures (Pratt, 1986; Goldson, 2000; Bateman, 2002; Office of Criminal Justice Reform, 2010; Ministry of Justice, 2014), and this was a recurrent theme throughout this thesis. Although this thesis seeks to invite further consideration of alternatives to the existing statutory admission criterion so that a greater number of young people can gain eligibility for a diversionary

disposal, it should not be at the expense of any inadvertent ‘net-widening’ these changes may result in.

This thesis has sought to contribute to existing academic and professional knowledge in the field of diversionary youth justice, and encourage greater academic and professional interest in the importance of the admission criterion as both a gateway and barrier to these processes.

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APPENDIXES

Appendix 1 Police Interview Request

University Square

Luton

Bedfordshire

LU1 3JU

8th July 2013

Dear Police Officer,

I am a solicitor with the Crown Prosecution Service and also currently undertaking a Professional Doctorate in Youth Justice at the University of Bedfordshire, and would be most grateful if you considered completing the attached questionnaire which forms part of my research. The approval of Deputy Chief Constable [redacted] at [redacted] has been authorised for you to assist me with this research and complete the questionnaire.

The purpose of the Doctorate is to research the mandatory requirement that a young person must make an admission before diversion from formal court proceedings by way of a reprimand, Final Warning, Youth Caution or other

out of court disposal can be considered. I am examining specific instances where a young person has lost the opportunity for diversion for the sole reason that they failed to make an admission, but either later requested a second police interview so that an admission could be made, or pleaded guilty at court.

Separate to these cases studies, I am hoping to obtain your views as a police officer who interviews young people, as to the reasons why some young people may unnecessarily lose the opportunity for diversion by failing to make an admission. Your thoughts as to any procedural improvements or statutory changes which may better facilitate diversion in these types of cases would also be of real interest.

Separate questionnaires shall be sent to, decision makers (Evidential Review Officers and CPS Prosecutors), YOS officers and defence solicitors, however I hope that your answers to the questionnaire will increase the quality and depth of this research, as well as provide a valuable perspective from a professional in this field.

The questionnaire will not require you to provide your name, shoulder number or any other personal information which would result in your identification or that of Thames Valley Police, and all responses shall be used only for the purposes of my thesis, and/or a paper which may be published in an academic journal, and/or a poster, and/or any lectures I may give either to students, academics or professionals. This research has been approved by the University of Bedfordshire ethics committee and is being supervised by

Dr Tim Bateman and Professor John Pitts. Dr Bateman can be contacted on 01234-400400 or at tim.bateman@beds.ac.uk at first instance if you have any questions, suggestions or complaints concerning this questionnaire or the research in general.

Finally, as my research involves case studies within the Thames Valley and I am currently a prosecutor with the CPS, I am unable to interview any relevant young people or any person who acted as an appropriate adult, as there would be a conflict of interest. I have arranged however for an independent third party to do so on my behalf and if you are aware of any young person or person who acted as appropriate adult who may be willing to assist this research, could you kindly let me know or forward any other questions you may have to me at karen.cushing@beds.ac.uk.

I am most grateful for your kind assistance and look forward to receiving the completed questionnaire either by post in the pre-paid envelope which is attached, or by personal return.

With many thanks,

Karen Cushing
Senior Crown Prosecutor and
Professional Doctorate Student
University of Bedfordshire

Appendix 2 Defence Interview Request

University Square

Luton

Bedfordshire

LU1 3JU

08 May 2013

Dear Defence Solicitor,

I am currently undertaking a Professional Doctorate in Youth Justice at the University of Bedfordshire and would be most grateful if you considered completing the attached questionnaire, which forms part of my research for the Doctorate.

I am researching the mandatory requirement that a young person must make an admission to an offence before diversion from formal court proceedings can be considered, and examining instances where a young person has not been diverted for the sole reason that they failed to make an admission; but subsequently requested a second police interview so that an admission could be made, or pleaded guilty at court.

Separate to these cases studies, I am hoping to obtain your views as a defence solicitor who advises young people in police custody and represents them at court, as to the reasons why some young people may unnecessarily lose the opportunity for diversion by failing to make an admission. Your thoughts as to any procedural improvements or statutory changes which may better facilitate diversion in these types of cases would also be of real interest.

Separate questionnaires shall be sent to police officers, decision makers (Evidential Review Officers and CPS Prosecutors) and YOS officers, however I hope that your answers to the questionnaire will increase the quality and depth of this research, as well as provide balance so that all relevant professionals have contributed.

The questionnaire will not require you to provide your name or any other personal information which would result in your identification, and all responses shall be used only for the purposes of my thesis, and/or a paper which may be published in an academic journal, and/or a poster, and/or any lectures I may give either to students, academics or professionals. This research has been approved by the University of Bedfordshire ethics committee and is being supervised by Dr Tim Bateman and Professor John Pitts. Dr Bateman can be contacted on 01234-400400 or at tim.bateman@beds.ac.uk at first instance if you have any questions, suggestions or complaints concerning this questionnaire or the research in general.

Finally, as my research involves case studies within the Thames Valley and I am currently a prosecutor with the CPS, I am unable to interview any relevant young people or any person who acted as an appropriate adult, as there would be a conflict of interest. I have arranged however for an independent third party to do so on my behalf and if you are aware of any young person or person who acted as appropriate adult who may be willing to assist this research, could you kindly let me know at karen.cushing@beds.ac.uk. Any other queries can also be forwarded to me at this email address.

I am most grateful for your kind assistance and look forward to receiving the completed questionnaire either by post in the pre-paid envelope which is attached, or by personal return.

With many thanks,

Karen Cushing
Professional Doctorate Student
University of Bedfordshire

Appendix 3 Police Questionnaire

Police Officer Questionnaire

1. Young people who have committed a low level offence on occasion lose the benefit of an out of court disposal because they have not made a satisfactory admission.

Please number the following reasons from 1 (most common) to 12 (least common) as to why you believe this happens.

- Legal advice to answer 'no comment'
- Cultural – the young person believes they should always answer 'no comment' or deny the offence no matter what
- Adolescent wilfulness
- Does not want to implicate a co-suspect
- Fear of parental admonishment if they admit to offending when their parent is acting as their Appropriate Adult
- Misunderstanding as to the law – the young person believed they were making an admission but in fact they were technically asserting a defence (for example admitted being in possession of a bladed article but said they had a reasonable excuse for having it, which is a defence in law)
- Influence of Appropriate Adult
- Pressures of arrest and detention in custody and a lack of opportunity to consider what to say in interview
- Difficulties the police have in explaining prior to an interview that an admission is needed, as to do so is to be exposed to an allegation that an admission is being induced
- Some young people's negative perception of the police and inability to engage
- Other – please state……
  ……
  ……...

2. Research suggests that black youths are subjected to cultural pressures to always answer 'no comment' in police interviews, and this partly explain their disproportionate escalation through the criminal justice system. Do you agree with this?

- Yes
- No
- Don't know

3. Should a young person who initially denied an offence or answered 'no comment' and is informed they are to be charged, be permitted a second opportunity to make an admission and be considered again for diversion?

- They should always be given a second opportunity to make an admission if it will secure an out of court disposal for them
- They should only be permitted a second opportunity if I am satisfied there is a good reason why they did not make an admission in their first interview.
- Never – the young person had an opportunity in their first interview or interviews to make an admission and I gave them every opportunity to do so. They purpose of the Final Warning Scheme is to encourage early frankness, and to allow another interview post-charge is a waste of resources and allowing them to 'play the system.

4. Prior to a young person's interview, how willing are you to engage in a discussion about diversion from prosecution if admissions are made in interview and the young person is potentially suitable?

- Always
- Usually
- Sometimes
- Never

5. Have you ever felt unable to adequately explain the process of diversion to a young person or their Appropriate Adult because you do not want to be accused of inducing an admission?

- Always
- Usually
- Sometimes
- Occasionally
- Never

Bryant and Bryant's Police Student Handbook gives a 'major warning' against discussing diversion with a suspect prior to an interview as this can expose an officer to an allegation that they have induced an

admission, yet paragraph 4.14 of the 2006 Final Warning Scheme Guidance states that young people and their Appropriate Adults should have access to information prior to an interview so that they can make an informed decision as to whether to make an admission.

Are you able to satisfy these two guidelines?

- ☐ Yes – they are not in conflict and I do not have any difficulty
- ☐ Yes – but with great difficulty – it is difficult to discuss diversion because it means I have to explain that an admission is necessary if a young person is to receive an out of court disposal, and this is contrary to other guidance we have on pre-interview discussions and does expose me to unfounded allegations that I am trying to induce an admission
- ☐ No – it is impossible to comply with paragraph 4.14 and the separate police guidelines on pre-interview discussions about out of court disposals only being considered if admissions are made
- ☐ Don't know.
- ☐ Please explain further should you wish to do so……
  ……
  …

7. In your experience can the pressures of detention in custody and a PACE interview adversely affect a young person's ability to make an informed decision about whether to make an admission?

- ☐ Always
- ☐ Usually
- ☐ Sometimes
- ☐ Rarely
- ☐ Never
- ☐ Don't know

8. In your experience can the pressures of detention in custody adversely affect a young person's ability to articulate a satisfactory admission in interview?

- ☐ Always
- ☐ Usually
- ☐ Sometimes
- ☐ Rarely

- ☐ Never

9. Would greater use of street bail afford young people and their parents the opportunity to make an informed decision prior to an interview as to whether to make an admission?

Yes

No

Don't know

10. Research suggests law firms routinely deploy inexperienced solicitors/representatives to represent young people in custody. Do you agree with this?

- ☐ Yes
- ☐ No
- ☐ It is too variable to say
- ☐ Don't know

11. Research suggests defence representatives on occasion advise young people to make admissions when the evidence against them is either weak or inadequate, to secure for them the benefits of diversion from a formal prosecution.

Based solely on your own experience do you agree with this?

- ☐ Yes – it happens frequently
- ☐ Yes – it happens occasionally
- ☐ No – I have never seen this happen before
- ☐ I don't know – the advice given by a defence representative does not involve me

12. Do you consider that access to legal advice positively contributes to young people's outcomes when in custody?

- ☐ Always
- ☐ Usually
- ☐ Occasionally
- ☐ Never

13. By what method/s do you provide pre-interview disclosure to a young person and their Appropriate Adult when they are unrepresented?

- □ Written disclosure only
- □ Predominantly written disclosure but with some verbal disclosure as well
- □ Verbal disclosure only
- □ Predominantly written disclosure but with some verbal disclosure as well.
- □ Verbal disclosure only
- □ Predominantly verbal disclosure but with some written disclosure as well
- □ An even mixture of written and verbal disclosure
- □ No disclosure provided
- □ Too variable to say

14. By what method/s do you usually provide pre-interview disclosure to a legal representative advising a young person in custody?

- □ Written disclosure only
- □ Predominantly written disclosure but with some verbal disclosure as well.
- □ Verbal disclosure only
- □ Predominantly verbal disclosure but with some written disclosure as well
- □ An even mixture of written and verbal disclosure
- □ No disclosure provided
- □ Too variable to say

15. In your experience, how would you describe the adequacy of pre-interview disclosure provided by the police?

- □ Excellent – the police always provide full disclosure of the evidence they have or may be able to obtain from the outset
- □ Adequate – the police usually provide adequate disclosure of the evidence they have or may be able to obtain
- □ Adequate after further request – the police usually provide adequate disclosure of the evidence after the defence have pursed additional disclosure
- □ Poor – the police do not provide adequate disclosure of the evidence they have or may be able to obtain

- ☐ It is too variable to describe accurately

16. Do you consider that an unrepresented young person received the same adequacy of pre-interview disclosure as a young person who is legally represented?

- ☐ Yes
- ☐ No
- ☐ Don't know

17 By what method/s do you provide pre-interview disclosure to a young person and their Appropriate Adult when they are unrepresented?

- ☐ Written disclosure only
- ☐ Predominantly written disclosure but with some verbal disclosure as well.
- ☐ Verbal disclosure only
- ☐ Predominantly verbal disclosure but with some written disclosure as well
- ☐ An even mixture of written and verbal disclosure
- ☐ No disclosure provided
- ☐ Too variable to say

18. By what method/s do you provide pre-interview disclosure to a legal advisor when they are advising a young person in custody?

- ☐ Written disclosure only
- ☐ Predominantly written disclosure but with some verbal disclosure as well.
- ☐ Verbal disclosure only
- ☐ Predominantly verbal disclosure but with some written disclosure as well
- ☐ An even mixture of written and verbal disclosure
- ☐ No disclosure provided
- ☐ Too variable to say

19. In your experience, how would you describe the adequacy of pre-interview disclosure provided by the police?

- ☐ Excellent – the police always provide full disclosure of the evidence they have or may be able to obtain from the outset

- Adequate – the police usually provide adequate disclosure of the evidence they have or may be able to obtain
- Adequate after further request – the police usually provide adequate disclosure of the evidence after the defence have pursed additional disclosure
- Poor – the police do not provide adequate disclosure of the evidence they have or may be able to obtain
- It is too variable to describe accurately

20. Do you consider that an unrepresented young person received the same adequacy of pre-interview disclosure as a young person who is legally represented?

- Yes
- No
- Don't know

21. In your experience, what is the most suitable method of interviewing a young person suspected of committing a low level offence, who is probably eligible for diversion if a satisfactory admission is made?

- The young person under arrest, detained in custody and interviewed in the custody suite
- They young person interviewed in the custody suite as a volunteer
- Outside of the police station but not at the young person's home
- At the young person's home
- It is too variable to say as every case is different
- Other…….

22. In your experience are young people aged 10-13 years able to adequately understand the legal elements of the offence they are alleged to have committed?

- Always
- Usually
- Rarely
- Never
- Don't know

23. In your experience are young people aged 14-17 years able to adequately understand the legal elements of the offence they are alleged to have committed?

- ☐ Always
- ☐ Usually
- ☐ Rarely
- ☐ Never
- ☐ Don't know

24. In your experience are young people aged 10-13 years able to adequately articulate a satisfactory admission in a police interview?

- ☐ Always
- ☐ Usually
- ☐ Rarely
- ☐ Never
- ☐ Don't know

25. In your experience are young people aged 14-17 years able to adequately articulate a satisfactory admission in a police interview?

- ☐ Always
- ☐ Usually
- ☐ Rarely
- ☐ Never
- ☐ Don't know

26. Have you ever experienced a scenario where a young person did not make an admission because they feared parental admonishment from their parent who was acting as Appropriate Adult, and this resulted in a lost opportunity for diversion?

- ☐ Yes
- ☐ No

27. Who do you consider the best to perform the role of the Appropriate Adult?

- ☐ Parent
- ☐ Other family member
- ☐ YOS/Social Services

- Trained Volunteer
- Other……

28. The criteria for a satisfactory admission in the 2006 Final Warning Scheme Guidance is 'A reprimand or warning can be given only if the young person makes a clear and reliable admission to all elements of the offence. This should include an admission of dishonesty and intent, where applicable'.

In your experience, is this test a necessary gateway to divert young people who have committed a low level offence?

- Yes – this test is reasonable and diversion will only work if a young person is willing to admit an offence and engage from the outset with the police and YOS.
- No – young people should make some form of admission to gain eligibility for diversion but this test is too onerous for many young people and needs simplifying
- No – it should not be necessary for a young person to make an admission this is often difficult for a variety of reasons, and if they have not denied an offence and have indicated they will accept an out of court disposal, then that should be adequate.

29. Under the Youth Conditional Caution pilot scheme, a young person who answers 'no comment' may be eligible for a Youth Conditional Caution, as they have not denied the offence or put forward a defence.

In your opinion, is this a more suitable alternative than the admission criteria in the Final Warning Scheme Guidance to secure an out of court disposal?

- Yes
- No
- Don't know

30. Do you have any suggestions to best enable young people aged 10-17 years (where there is adequate evidence against them and their rights can be fully protected) to gain eligibility for diversion form the formal criminal justice system?

……
……
……

Appendix 4 Defence Questionnaire

Defence/Legal Representative Questionnaire

1. How many years have you advised young people aged 10-17 years at the police station?

- ☐ Less than 1 year
- ☐ 2-5 years
- ☐ 6-110 years
- ☐ 11 or more

2. How often to do you attend a police station and advise young people aged between 10-17 years?

- ☐ At least once a week
- ☐ At least once a fortnight
- ☐ At least once a month
- ☐ At least once every three months
- ☐ At least once every 6 months
- ☐ Rarely
- ☐ Never

3. On average, when you are representing a young person in custody as Duty Solicitor, how likely is it that you have met this person before?

- ☐ Always met before
- ☐ Usually met before
- ☐ Occasionally met before
- ☐ Never met before
- ☐ It is just too variable to estimate

4. On average, when you are representing a young person in custody acting as 'Own Client' how likely is it you have met this person before?

- ☐ Always met before
- ☐ Usually met before
- ☐ Occasionally met before
- ☐ Never met before
- ☐ It is just too variable to estimate

5. Compared to advising adult suspects at the police station, how confident are you advising young people at the police station?

- □ More confident
- □ Less confident
- □ No difference
- □ whatsoever

6. How often do you represent young people who are interviewed by the police on a voluntary basis outside of the police station?

- □ At least once a week
- □ At least once a fortnight
- □ At least once a month
- □ At least once every three months
- □ Rarely
- □ Never

7. Do you consider that access to legal advice positively contributes to a young person's outcome when in custody?

- □ Always
- □ Usually
- □ Occasionally
- □ Never

8. Research suggests law firms routinely deploy less experienced solicitors or police station representatives to advise young people arrested for minor offences. Would you agree with this?

- □ Yes
- □ No
- □ Don't know
- □ If don't know, please explain further should you wish to……
  ……
  …...

9. How do you usually receive pre-interview disclosure from the police when advising a young person in custody?

- □ Written disclosure only

- Predominantly written disclosure but with some verbal disclosure as well.
- Verbal disclosure only
- Predominantly verbal disclosure but with some written disclosure as well
- An even mixture of written and verbal disclosure
- No disclosure provided
- Too variable to say

10. On average how would you describe the adequacy of pre-interview disclosure provided to you by the police when advising a young person?

- Excellent -the police always provide full disclosure
- Adequate – the police usually provide enough disclosure so that I can advise properly
- Adequate after further request – the police usually provide adequate disclosure but only after I have requested further details.
- Poor – the police provide some disclosure but it is usually not adequate for me to advise my client properly
- It is too variable to describe accurately

11. If you have experience of not receiving adequate pre-interview disclosure from the police when advising a young person, what do you believe the reasons for this are? Please rank the following from 1 (most common) to 10 (least common). Please leave blank any reason you do not consider relevant.

- Poor relationship with the police
- Deliberate withholding of evidence in order to create an ambush in interview
- Deliberate withholding of evidence in order to frustrate your ability to advise your client
- There are other suspects and the police are concerned disclosure will result in collusion
- The police investigation is still ongoing and disclosure could prejudice or jeopardise the gathering of further evidence
- Nature and seriousness of offence
- Obstructive attitude of an individual officer rather than any general policy
- Unintentional withholding of disclosure – the police do not necessarily know what disclosure I need to advise adequately

- ☐ Other – please explain……
  ……
  ……

12. How often do you have to request additional disclosure from the police so that you can adequately advise your client?

- ☐ Always
- ☐ Usually
- ☐ Occasionally
- ☐ Rarely
- ☐ Never

13. Have you ever received inaccurate, false or misleading disclosure from the police prior to a young person's interview?

- ☐ Yes
- ☐ No

14. If you answered 'yes' to the above, how often does this happen?

- ☐ Always
- ☐ Usually
- ☐ Occasionally
- ☐ Exceptionally

15. Is the pre-interview disclosure you receive from the police of any better quality for young people than for adults?

- ☐ Yes – it is better
- ☐ No- it is worse
- ☐ Neutral – no real difference

16. Have you ever advised a young person to exercise their right to silence because of inadequate police disclosure, in the knowledge that this could jeopardise consideration for a reprimand, final warning or other type of diversion?

- ☐ Yes
- ☐ No
- ☐ If yes, please describe how often this occurs and in what circumstances……

……
….

17. Have you ever regretted advising a young person to exercise their right to silence in interview when this advice has resulted in a lost opportunity for diversion?

- ☐ Yes
- ☐ No
- ☐ If yes, please describe how often this occurs and in what circumstances……
  ……
  ….

18. Have you ever advised a young person to make an admission when you were not sure there was adequate evidence, but you wanted to secure for them the benefits of diversion from a formal prosecution?

- ☐ Yes
- ☐ No
- ☐ If yes, please describe how often this occurs and in what circumstances……
  ……
  ….

19. Prior to the interview of a young person, how willing are the police to engage in a discussion about diversion from prosecution if admissions are made?

- ☐ Always
- ☐ Usually
- ☐ Sometimes
- ☐ Rarely
- ☐ Never

20. Have you ever been able to secure a guarantee from a police officer prior to an interview that if an admission is made the young person you are advising will be diverted by way of a reprimand, final warning or caution?

- ☐ Always
- ☐ Usually
- ☐ Sometimes

- Rarely
- Never

21. If you were able to secure a guarantee of diversion by way of a reprimand, final warning, youth caution or conditional caution, would this increase the likelihood of you advising a young person to make an admission?

- Yes
- No
- Don't know

22. In your experience do the police comply with paragraph 4.14 of the Final Warning Scheme Guidance ('Young people and their parents/carers should have access to information about the options available including the final warning scheme so that they can make an informed decision before the question as to whether they admit the offence is put to them').

- Always
- Usually
- Occasionally
- Never
- Don't know

23. Do you consider that police fear of unfounded allegations of inducement is a factor in any unwillingness to discuss diversion with you prior to an interview?

- Yes
- No
- Don't know

24. Bryant and Bryant's Police Student Handbook give a 'major warning' to police against discussing the possibility of diversion with a suspect prior to an interview, yet paragraph 4.14 of the 2006 Final Warning Scheme Guidance states that young people and their Appropriate Adults should have access to information so that they can make an informed decision as to whether to make an admission.

Do you consider these separate guidelines cause the police genuine difficulties in discussing admissions/diversion prior to an interview?

- Yes
- No
- Don't know

25. In your experience, are decision makers (police and CPS) willing to offer second interviews to young people who post-charge want the opportunity to make an admission to gain eligibility for diversion?

- Will always offer a second opportunity if asked
- Will usually offer a second opportunity if asked
- Will only offer a second opportunity if a satisfactory reason for failing to make an admission in the first interview is provided
- Will never offer a second opportunity
- There is never a consistent approach by the police/CPS and it is too difficult to generalise
- Other……
……...

26. Please select from the following the correct admission criteria for a youth admission in the 2006 Final Warning Scheme Guidance

- A reprimand or final warning can be given only if the young person makes a clear and reliable admission to all elements of the offence. This should include an admission of dishonesty and intent, where applicable.
- A reprimand or final warning can be given only if the young person makes a clear and reliable admission to all elements of the offence
- A reprimand or final warning can be issued if a young person makes an adequate admission
- The young person makes a satisfactory admission that he/she committed the offence they are alleged to have committed
- A reprimand or final warning can only be issued if the young person demonstrates to a constable a positive recognition of his or her guilt
- The young person exercises their right to silence in a PACE compliant interview but does not put forward a positive defence. This is commensurate with not denying the offence and is satisfactory for the purposes of the Final Warning Scheme Guidance

27. In your experience are young people in custody aged 10-13 years able to adequately understand the legal elements of the offence they are alleged to have committed?

- ☐ Always
- ☐ Usually
- ☐ Rarely
- ☐ Never

28 In your experience are young people in custody aged 14-17 years able to adequately understand the legal elements of the offence they are alleged to have committed?

- ☐ Always
- ☐ Usually
- ☐ Rarely
- ☐ Never

29. In your experience are young people in custody aged 10-13 years able to adequately articulate a satisfactory admission in a PACE interview?

- ☐ Always
- ☐ Usually
- ☐ Rarely
- ☐ Never

30. In your experience are young people in custody aged 14-17 years able to adequately articulate a satisfactory admission in a PACE interview?

- ☐ Always
- ☐ Usually
- ☐ Rarely
- ☐ Never

31. If a young person you are advising in custody has indicated he/she will not make an admission (despite your advice that there is adequate evidence and they will most likely be diverted if they make an admission), what do you believe the reasons are? Please ran the following from 1 (most common) to 9 (least common) and leave blank any which are not relevant

- ☐ Does not want to implicate a co-suspect
- ☐ Fear of parental admonishment if an admission is made
- ☐ Cultural – the young person is of the view that it is always best to 'go no comment'
- ☐ Evidential – the young person/Appropriate Adult believed there was insufficient evidence
- ☐ Influence of the Appropriate Adult
- ☐ Adolescent wilfulness
- ☐ Strategic – wants to hear the evidence disclosed in an interview first before deciding whether to make an admission
- ☐ Fear of the police
- ☐ Other – please explain……
  ……
  ……

32. In your experience, when young people have the benefit of legal advice, what is the primary influence on a young person's decision to either admit an offence, exercise a right to silence of deny an offence in their police interview?

- ☐ The legal representative – the advice I give is the primary influence
- ☐ The Appropriate Adult
- ☐ The young person – the decision is primarily made by them irrespective of any advice or influence
- ☐ Other – please list……
  ……

33. Who do you consider to be the primary decision maker as to whether a young person aged 10-13 years makes an admission, exercises a right to silence or denies an offence in interview?

- ☐ The legal advisor – although our role is technically to advise, our influence is such that it is effectively our decision
- ☐ The young person
- ☐ The Appropriate Adult
- ☐ YOS/Social Services
- ☐ Don't know

34. Who do you consider to be the primary decision maker as to whether a young person aged 14-17 years makes an admission, exercises a right to silence or denies an offence in interview?

- ☐ The legal advisor – although our role is technically to advise, our influence is such that it is effectively our decision
- ☐ The young person
- ☐ The Appropriate Adult
- ☐ YOS/Social Services
- ☐ Don't know

35. When a young person does not have the benefit of legal advice and denies an offence or exercises their right to silence in a police interview, who do you consider is the primary decision make?

- ☐ The legal advisor – although our role is technically to advise, our influence is such that it is effectively our decision
- ☐ The young person
- ☐ The Appropriate Adult
- ☐ YOS/Social Services
- ☐ Don't know

36. In your experience is the ethnicity of the young person a determining factor in any decision to exercise a right to silence in interview when there appears adequate evidence exists and diversion is a possibility

- ☐ Yes
- ☐ No
- ☐ Don't know

37. Research suggests black youths are subjected to cultural pressures to always answer 'no comment' in police interviews, and this may partly explain their disproportionate escalation through the criminal justice system. Do you agree with this?

- ☐ Yes
- ☐ No
- ☐ Don't know

38. In your experience, is the gender of a young person a determining factor in any decision to exercise a right to silence in interview when there appears adequate evidence exists and diversion is a possibility

- ☐ Yes
- ☐ No
- ☐ Don't know

39. In your experience are parents who act as Appropriate Adults for their child capable of performing this role?

- ☐ Always
- ☐ Usually
- ☐ Occasionally
- ☐ Never

40. Have you ever experienced a scenario where a young person did not make an admission because they feared parental admonishment from their parent who was acting as Appropriate Adult, and this resulted in a lost opportunity for diversion?

- ☐ Yes
- ☐ No

41. Research suggests parents acting as Appropriate Adults sometimes exert influence on their child to give an account in interview which reflects their own interests, rather than their child's. Do you agree with this?

- ☐ Yes
- ☐ No
- ☐ Don't know

42. Who do you consider best to person to perform the role of the Appropriate Adult?

- ☐ Parent
- ☐ Other family member
- ☐ YOS/Social Service
- ☐ Trained volunteer
- ☐ Other

43. The criteria for a satisfactory admission in the 2006 Final Warning Scheme Guidance is 'A reprimand or wanting can be given only if the young person makes a clear reliable admission to all elements of the offence. This should include an admission of dishonesty and intent, where applicable.

In your experience, is this test necessary to divert young offenders?

- Yes - this test is reasonable and diversion will only work if a young person is willing to admit an offence and engage from the outset with the police and YOS
- No – young people should make some form of admission to gain eligibility for diversion but this test is too onerous for many young people.
- No – it should not be necessary for a young person to make an admission – this is often difficult for them and if they have not denied an offence and have indicated they will accept a reprimand, youth caution, conditional caution or youth restorative disposal, then that should be adequate.
- Please explain further should you wish to do so……
  ……

44. Under the Youth Conditional Caution Pilot Scheme, a youth offender who answers 'no comment' is eligible for a Youth Conditional Caution (where there is adequate evidence) as they have not denied the offence they are alleged to have committed or put forward a defence.

In your opinion, would this test be a more suitable alternative to the current requirement that an admission is made?

- Yes
- No
- Don't know
- Please explain further should you wish to do so……
  ……

45. Do you consider that the pressures of detention in custody and a PACE interview adversely affects a young person's ability to decide what account, if any, to give in a police interview?

- Always
- Usually
- Sometimes
- Rarely
- Never

46. Do you consider that the pressures of detention and a PACE interview adversely affects a young person's ability to articulate a satisfactory admission in their police interview?

- Always
- Usually
- Sometimes
- Rarely
- Never
- Please explain further should you wish to do so……
  ……
  …….

47. Do you consider that the negative experiences of arrest, detention in custody and a PACE interview can sometimes dissuade young people from further offending?

- Yes
- No
- Don't know

48. Do you consider that greater use of street bail would afford young people and their parents the opportunity to make an informed decision prior to an interview as to whether to make an admission?

- Yes
- No
- Don't know

49. An increasing number of young people are now being interviewed by the police outside of the police station. Do you support this?

- Yes – too many young people are being held in custody unnecessarily and we should have more interviews outside of a police station

- Maybe – I would support this but only if I could be satisfied that young people's PACE rights were protected
- Maybe – I would support this but only if I could be satisfied that young people's PACE rights were protected but I am not confident this would happen without substantial changes to police practices
- No – too many young people are not having their PACE rights protected when interviewed outside of custody, and although I prefer it if young people were not detained at a police station, at present this is the only way a young person can have their PACE rights protected
- Don't know
- Please explain further should you wish to do so……
  ……...

50. Do you have any suggestions to best enable young people aged 10-17 years (where there is adequate evidence against them and their rights can be fully protected) to gain eligibility for diversion from the formal criminal justice system?.....
.....
.....

Appendix 5 Police Interview Schedule

Police Interview Schedule

Thank you for agreeing to meet with me today. I am currently researching as part of my professional doctorate at the University of Bedfordshire the role of the admission criterion within diversionary youth justice practices.

The purpose of this interview is to try and assist me in obtaining more descriptive data and information from the views of stakeholders involved in diversionary processes, and how the admission criterion operates within it.

I will also be interviewing legal representatives as part of this research.

I anticipate the interview will last no more than 30 minutes.

1. Do you have any questions before I begin?

2. Have you completed and returned the questionnaire?

3. Are you a police officer or civilian interviewer?

4. What is your rank?

5. How many years have you been a serving police officer or civilian interviewer?

6. Are you currently based in the city or the rural police station?

7. Can you recall how many times you have interviewed a young person who has committed a low level offence and was eligible for an out of court disposal?

8. Do you know what the current statutory admission criterion is?

9. Can you explain it to me?

10. Do you have a view on the standard of admission currently required of young people [read out the statutory criterion]? For example, is it a good standard, too tough, too easy?

11. Do you think young people should have to make an admission in order to gain eligibility for an out of court disposal?

12. Can you elaborate on your reasons?

13. The statutory admission criterion is the same for 10 year olds and 17 year olds. What are your views on whether age should make a difference as to whether young people should have to make an admission?

14. Does age make a difference in your experience as to whether young people are able to make a satisfactory admission?

15. Do you think the pressures of arrest and interview makes any difference to whether a young person makes an admission or not?

16. Have you ever witnessed instances when a young person has unnecessarily lost the opportunity to receive an out of court disposal because they did not make an admission? If so can you suggest why this happened in those cases?

17. If you completed the questionnaire did you identify any other reasons not included in the questions? If yes can you elaborate for me on your reasons.

18. If you did not complete the questionnaire can you look at question 1 of the questionnaire now, and tell me if there are any other reasons which have not been included?

19. I am researching whether the police are given conflicting duties concerning what discussions they can have with young people, their Appropriate Adults and legal advisors before an interview about the possibility of a diversionary outcome. How easy or difficult is it to have those discussions?

20. I am researching whether some young people are advised by their legal representatives to answer ‘no comment’ because they have not received adequate pre-interview disclosure from the police. What are your views on this?

21. How would you describe the relationship between the police and legal representatives concerning constructive discussion about the possibility of diversion for a young person?

22. Do you think legal advisors positively contribute to securing a diversionary outcome and/or the best interests of young people?

23. I am researching what the role of the Appropriate Adult is when young people do not make admissions when it is in their best interests to have made one. What are your views about Appropriate Adults in this context?

24. Who do you think is best placed to act as an Appropriate Adult to help young people make admissions in suitable cases to secure an out of court disposal?

25. When a young person does not initially make an admission, the police are not obliged to offer another interview. What are your thoughts about this?

26. How willing would you be to offer a young person a second interview so that they can make an admission and secure an out of court disposal?

27. I am researching whether there is a culture in some communities that encourages young people to avoid engagement with the police and answer ‘no comment’ in a police interview, even if this loses them an out of court disposal. What are your views on whether this may be applicable in this area?

28. When you are interviewing a young person who has committed a low level offence and may be eligible for an out of court disposal, how often are they under arrest and interviewed in the custody suite?

29. There is some research which suggests that BME youths are less likely to make admissions than white youths. Do you have any experience of this?

30. Do you have any views on any changes to current practices that may improve opportunities for young people to make admissions and secure an out of court disposal?

Appendix 6 Defence Interview Schedule

Interview Schedule – Legal Representatives/Defence Solicitors

Thank you for agreeing to meet with me today. I am currently researching as part of my professional doctorate at the University of Bedfordshire the role of the admission criterion within diversionary youth justice practices.

The purpose of this interview is to try and assist me in obtaining more descriptive data and information from the views of stakeholders involved in diversionary processes, and how the admission criterion operates within it.

I will also be interviewing police officers and civilian interviewers as part of this research.

I anticipate the interview will last no more than 30 minutes.

1. Do you have any questions before I begin?

2. Have you completed and returned the questionnaire?

3. Are you a solicitor or police station representative?

4. Are you a Duty Solicitor?

5. How many years have you been qualified?

6. Can you recall how many times you have represented at the police station a young person who has committed a low level offence and was eligible for an out of court disposal if they made an admission?

7. Do you represent young people at the city and the rural police station?

8. Do you know what the current statutory admission criterion is?

9. Can you explain it to me?

10. Do you have a view on the standard of admission currently required of young people [read out the statutory criterion]? For example, is it a good standard, too tough, too easy?

11. Do you think young people should have to make an admission in order to gain eligibility for an out of court disposal?

12. Can you elaborate on your reasons?

13. The statutory admission criterion is the same for 10 year olds and 17 year olds. What are your views on whether age should make a difference as to whether young people should have to make an admission?

14. Does age make a difference in your experience as to whether young people are able to make a satisfactory admission?

15. Do you think the consequences of arrest and interview influences whether a young person makes an admission or not?

16. Have you ever witnessed instances when a young person has unnecessarily lost the opportunity to receive an out of court disposal because they did not make an admission? If so, can you explain why you believed this happened?

17. If you completed the questionnaire did you identify any other reasons not included in the possible reasons? If yes can you elaborate for me on your reasons.

18. If you did not complete the questionnaire can you look at question 11 of the questionnaire now, and tell me if there are any other reasons which are not included in that list?

19. I am researching whether the police are given conflicting duties concerning what discussions they can have with young people, their Appropriate Adults and legal advisors before an interview about the possibility of a diversionary outcome. What are your views on this?

20. I am researching whether some young people are advised by their legal representatives to answer ‘no comment’ because they have not received adequate pre-interview disclosure from the police. What are your views on this?

21. How would you describe the relationship between the police and legal representatives concerning constructive discussion about the possibility of diversion for a young person?

22. Do you think legal advisors positively contribute to securing a diversionary outcome and/or the best interests of young people?

23. I am researching the role of the Appropriate Adult when young people do not make admissions when it is seemingly in their best interests to have made one. What are your views about Appropriate Adults in this context?

24. Who do you think is best placed to act as an Appropriate Adult to help young people make admissions in suitable cases to secure an out of court disposal?

25. When a young person does not initially make an admission, the police are not obliged to offer another interview so that they can make one. What are your views about this?

26. In your experience how willing are the police/CPS to offer a young person a second or multiple interviews so that they can make an admission and secure an out of court disposal?

27. I am researching whether there is a culture in some communities that encourages young people to avoid engagement with the police and answer ‘no comment’ in a police interview, even if this loses them an out of court disposal. What are your views on whether this may be applicable in this area?

28. How do you think young people perceive the police in this area, and how willing are they to engage with them?

29. There is some research which suggests that BME youths are less likely to make admissions than white youths. Do you have any experience of this?

30. Do you have any views on any changes to current practices that may improve opportunities for young people to make admissions and secure an out of court disposal?

Appendix 7 Categories of Practitioner Questionnaire and Interview Respondents

Completed Questionnaire Responses

Respondents	5 years' experience	5 years' experience	Total
Civilian Interviewer	4	0	4
Police officer	17	8	25
Accredited Representative		3	3
Qualified Solicitor	3	15	18
Total			50

Interview Reponses

Respondents	5 years' experience	5 years' experience	Total
Civilian Interviewer	6	0	6
Police officer	12	15	27
Accredited Representative	0	0	0
Qualified Solicitor	0	14	14
Total			47

DECLARATION

I declare that this thesis is my own unaided work. It is being submitted for the degree of

Professional Doctorate in Youth Justice at the University of Bedfordshire.

It has not been submitted before for any degree or examination in any other University.

Name of candidate: Karen Cushing

Signature:……

Date: 26th August 2016